86-454

No.

Supreme Court, U.S.
FILED
SEP 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

S. KELLERMAN, d/b/a Authorized Sales & Service; LOUIS T. DAVIS & ASSOCIATES, INC.; and BERNARD TUROVITZ,
Respondents.

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

PHYLLIS HESSE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

CHESTER T. KAMIN *
THOMAS S. MARTIN
RICHARD J. GRAY
ANTHONY C. EPSTEIN
MELINDA S. LEVINE
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

21 Dupont Circle N.W.
Washington, D.C. 20036
(202) 223-4440

* Counsel of Record

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Whether state law challenges to a telecommunications carrier's charging and disclosure practices concerning its provision of interstate telephone service are preempted by the comprehensive regulatory scheme embodied in the Communications Act?

RULE 28.1 LIST

The parent company of MCI Telecommunications Corporation is MCI Communications Corporation. MCI Telecommunications Corporation has no subsidiaries other than wholly owned subsidiaries. The following is a list of its affiliates:

MCI Transponder Leasing, Inc.

MCI/TAS Corp.

MCI Cellular Telephone Co.
MCI Air Signal of California, Inc.
MCI Air

MCI Services Corp.

MCI Galaxy III Transponder Leasing, Inc.

MCI Equipment Acquisition Corp.

MCI Data Processing, Inc.

Advantage Co., Ltd.

MCI International, Inc.

Western Union International, Inc.

MCI International Telecommunications Corp.

WUI Sales Corp.

WUI Service Corp.

Western Union International, S.R.L.

Western Union International, A.R.L.

S.A. Western International, N.V.

Western Union International, Gmbh

British Western Union, Ltd.

Western Union International, S.A.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
RULE 28.1 LIST	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
Preemption	8
CONCLUSION	13

APPENDIX

Opinion of the Illinois Supreme Court	App. A
Order of the Illinois Supreme Court Granting Leave to Appeal	App. B
Opinion of the Illinois Appellate Court, First District	App. C
Opinion of the Circuit Court of Cook County	App. D

TABLE OF AUTHORITIES

CASES:	PAGE
Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971)	10
American Broadcasting Companies, Inc. v. FCC, 643 F.2d 818 (D.C. Cir. 1980)	7
Benanti v. United States, 355 U.S. 96 (1957)	8
Bill Correctors, Ltd. v. MCI Telecommunications Corp., Dkt. No. E-84-11 (FCC 1984)	4, 5, 9
Certified Collateral v. Allnet Communications Services, Inc., Dkt. No. E-86-65 (FCC 1986)	4
Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983)	8
General Telephone Co. v. FCC, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969)	11
Ivy Broadcasting Co. v. American Telephone & Telegraph Co., 391 F.2d 486 (2d Cir. 1968)	5, 8, 10, 12
Kaplan v. ITT-U.S. Transmission Systems, Inc., 589 F. Supp. 729 (E.D.N.Y. 1984)	6
Lamb v. Sutton, 164 F. Supp. 928 (M.D. Tenn. 1958), *aff'd*, 274 F.2d 705 (6th Cir.), *cert. denied*, 363 U.S. 830 (1960)	8
Lazar v. MCI Communications Corp., 598 F. Supp. 951 (E.D. Mich. 1984)	6, 12

Lee v. Western Union Telegraph Co., No. C 84-1472 TEH (N.D. Cal. 1984), *appeal dismissed*, No. C 84-2383 (9th Cir. January 9, 1985) 6

Louisiana Public Service Commission v. FCC, ___ U.S. ___, 106 S. Ct. 1890 (1986) 7

MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) 10

New York Telephone Co. v. FCC, 631 F.2d 1059 (2d Cir. 1980) 8

Nordlicht v. New York Telephone Co., No. 86-7218 (2nd Cir. Aug. 25, 1986) (available September 17, 1986, on LEXIS, Genfed library, Cir. file) . 6, 8, 9

North Carolina Utilities Commission v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) 8

North Carolina Utilities Commission v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) 8

Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co., 251 U.S. 27 (1919) 6, 9, 11, 12

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 9

Sandler v. GTE Sprint Communications Corp., 622 F. Supp. 282 (E.D. Mich. 1985) 6

Schuster v. GTE Sprint Communications Corp., No. 83-5374 (N.D. Cal. 1984), *appeal dismissed*, No. 84-2383 (9th Cir. January 9, 1985) 6

Second Computer Inquiry, 77 F.C.C.2d 384 *modified*, 84 F.C.C.2d 50 (1980), *aff'd sub nom. Computer & Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) 9

Solomon v. MCI Telecommunications Corp. and GTE Sprint Communications Corp., No. 86-7167 (E.D. Mich. July 29, 1986) (available September 17, 1986, on LEXIS, Genfed library, Dist. file) 6

United States v. Western Electric Co., 531 F. Supp. 894 (D.N.J. 1981) 9

Vaigneur v. Western Union Telegraph Co., 34 F. Supp. 92 (E.D. Tenn. 1940) 8, 11

Western Union Telegraph Co. v. Boegli, 251 U.S. 315 (1920) 6

Western Union Telegraph Co. v. Esteve Brothers, 256 U.S. 566 (1921) 6, 10

Western Union Telegraph Co. v. Preister, 276 U.S. 252 (1928) 7

STATUTES:

28 U.S.C. § 1257 2

47 U.S.C. § 201 ..... 2, 7, 8, 9, 10, 11

47 U.S.C. § 203 .....2, 9, 10

47 U.S.C. § 205 ..... 3, 10, 11

47 U.S.C. § 208 3

47 U.S.C. § 209 3

47 C.F.R. § 61.55 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MCI TELECOMMUNICATIONS CORPORATION,

Petitioner,

v.

S. KELLERMAN, d/b/a Authorized Sales & Service; LOUIS T. DAVIS & ASSOCIATES, INC.; and BERNARD TUROVITZ,

Respondents.

MCI TELECOMMUNICATIONS CORPORATION,

Petitioner,

v.

PHYLLIS HESSE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

MCI Telecommunications Corporation ("MCI") petitions for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

OPINIONS BELOW

The Illinois Supreme Court's opinion (App. A, *infra*) is reported at 493 N.E.2d 1045. The order granting leave to appeal (App. B, *infra*) is not reported. The opinion of

the Illinois Appellate Court, First District (App. C, *infra*) is reported at 134 Ill. App. 3d 71. The opinion of the Circuit Court of Cook County (App. D, *infra*) is not reported.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on May 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

Section 201(b) of the Communications Act of 1934, 47 U.S.C. § 201(b), provides in pertinent part that "[a]ll charges, practices, classifications, and regulations for and in connection with such [interstate] communication service, shall be just and reasonable."

Section 203(c), 47 U.S.C. § 203, regarding tariffs, provides that:

> [N]o carrier shall (1) charge, demand, collect or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

Section 205(a), 47 U.S.C. § 205(a), authorizes the Federal Communications Commission, upon a finding that any "classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, . . . to determine and prescribe . . . what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed . . . ."

Section 208, 47 U.S.C. § 208, provides in pertinent part that if any person petitions the Federal Communications Commission complaining of any violation of the Act, "it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Section 209, 47 U.S.C. § 209, provides that:

> If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

STATEMENT OF THE CASE

Plaintiffs are customers of MCI, a telecommunications carrier which provides interstate long distance telephone service throughout the nation under comprehensive regulation by the Federal Communications Commission ("FCC"). Plaintiffs brought this nationwide class action seeking refunds under state law for MCI's alleged charging and disclosure practices concerning interstate calls. Plaintiffs' allegations represent an industry wide challenge. Here, as in more than twenty other class actions filed against MCI

and other telecommunications carriers in state and federal courts across the country, plaintiffs allege that a carrier charges for uncompleted long distance interstate calls, overcharges for completed calls by charging for time in excess of actual communication under certain circumstances, and has a nationwide practice of failing to disclose these alleged facts. (App. A, at 3-4.)[1] Plaintiffs seek refunds of interstate charges under state law theories, including breach of contract, common-law fraud, and violation of state consumer protection statutes.

The very same alleged conduct is also the subject of an ongoing FCC investigation. A class action complaint now pending before the FCC seeks refunds from MCI and other carriers due to these alleged charging and disclosure practices. *Certified Collateral Corp., et al. v. Allnet Communications Services, Inc., et al.*, Dkt. No. E-86-65 (FCC 1986). In addition, the FCC has determined that Formal Complaints challenging the same alleged conduct of five separate carriers "raise a question, within this Commission's expertise, concerning the defendants' charging practices. . . ." *Bill Correctors, Ltd. v. MCI Telecommunications Corp.*, Dkt. No. E-84-11, at 5 (FCC 1984). The FCC further determined that the plaintiff customer "properly raised as an area of concern, the method by which the carriers should notify customers of the possibility of erroneous charges for short calls and of their refund policies therefor." *Id.* at 7. Applying its expertise over disclosure, the FCC ordered MCI and the other carrier defendants

[1] Plaintiffs Kellerman, Davis, and Turovitz also allege that MCI's interstate facilities are inadequate to handle peak capacity loads, that MCI customers must pay a local call charge to the local telephone company when they use MCI's interstate service, and that MCI fails to disclose these alleged facts. Kellerman Complaint, Counts I, II, VII, and VIII.

to notify the Commission "of the means by which they advise customers of the possibility of billing errors and of their credit policies regarding calls of short duration." *Id.* at 2-3.

MCI argued to the Illinois trial court that the Communications Act preempts plaintiffs' state law claims and, in the alternative, that the action should be stayed or dismissed without prejudice under the doctrine of primary jurisdiction. (App. D.) MCI's motions were denied. *Id.* After the Illinois appellate court affirmed the trial court's decision (App. C), MCI sought review in the Illinois Supreme Court.

The Illinois Supreme Court held that plaintiffs' state law claims are not preempted by federal law. (App. A, at 10.) The Court acknowledged that " 'questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law'." (*Id.* at 8, quoting *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486, 490, 491 (2d Cir. 1968).) But in reviewing complaints alleging that MCI imposed charges not agreed upon and seeking refund of those charges (Hesse Complaint, Counts I, II; Kellerman Complaint, Counts V, VI, Count V, Prayer for Relief, ¶¶ B and C), the Court held that applying state law would not interfere with the preemptive federal regulatory scheme because plaintiffs do not challenge the lawfulness of MCI's federally regulated charges and practices. (App. A, at 10.) In reaching this conclusion, the Illinois Supreme Court ignored the ongoing FCC proceeding addressing the same conduct challenged here.

REASONS FOR GRANTING THE WRIT

The Illinois Supreme Court's decision directly conflicts with the decision of the United States Court of Appeals for the Second Circuit, and six federal district court decisions, applying a long line of decisions by this Court. Each of these federal courts held that federal law preempts state law claims, including fraud claims, concerning the charging and disclosure practices of federally regulated telephone companies. *Nordlicht v. New York Telephone Co.*, No. 86-7218 (2d Cir. Aug. 25, 1986) (available September 17, 1986, on LEXIS, Genfed library, Cir. file).[2] Ever since Congress originally occupied the field of interstate communications by the Act of 1910, this Court has consistently reversed State Supreme Court decisions permitting state law regulation of a carrier's interstate charges and practices. *See, e.g., Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 30 (1919) (state contract claims preempted); *Western Union Telegraph Co. v. Boegli*, 251 U.S. 315, 316 (1920) (state statute preempted); *Western Union Telegraph Co. v. Esteve Brothers & Co.*, 256 U.S. 566, 572 (1921) (state contract

---

[2] *Solomon v. MCI Telecommunications Corp. and GTE Sprint Communications Corp.*, No. 86-7167 (E.D. Mich. July 29, 1986) (available September 17, 1986, on LEXIS, Genfed library, Dist. file); *Sandler v. GTE Sprint Communications Corp.*, 622 F. Supp. 282 (E.D. Mich. 1985); *Lazar v. MCI Communications Communications Corp.*, 598 F. Supp. 951 (E.D. Mich. 1984); *Kaplan v. ITT-U.S. Transmission Systems, Inc.*, 589 F. Supp. 729 (E.D.N.Y. 1984); *Lee v. Western Union Telegraph Co.*, No. C 84-1472 (N.D. Cal. 1984), *appeal dismissed*, No. 84-2383 (9th Cir. January 4, 1985); *Schuster v. GTE Sprint Communications Corp.*, No. C 83-5374 (N.D. Cal. 1984), *appeal dismissed*, No. 84-2385 (9th Cir. January 9, 1985).

and negligence claims preempted); *Western Union Telegraph Co. v. Preister*, 276 U.S. 252, 259 (1928) (state gross negligence claims preempted).[3]

The contrary holding of the Illinois Supreme Court would subject the charges and practices of comprehensively regulated interstate telecommunications carriers to review under varied and possibly conflicting state standards. The danger of inconsistent regulation is highlighted by the fact that those same carriers are already parties to a pending FCC case involving precisely the same alleged conduct. The decision below would impose joint state and federal authority over the charging and disclosure practices of interstate telecommunications carriers when the Communications Act provides that the FCC shall exercise authority over "all" interstate telecommunications "charges" and "practices." 47 U.S.C. § 201(b).

This Court recently addressed the dividing line between federal and state regulation of the multi-billion dollar telecommunications industry. In *Louisiana Public Service Commission v. FCC*, ___ U.S. ___, 106 S. Ct. 1890, 1894 (1986), this Court discussed the integrity of the two "hemispheres" of the Communications Act, which allocates power over interstate communications to the FCC and power over intrastate communications to the states. Just as the Court prohibited federal intrusion into state regulation of intrastate services in *Louisiana Public Service Commission*, it should protect federal regulation of inter-

[3] When these Supreme Court decisions were issued, the Interstate Commerce Act was the federal act regulating interstate telecommunications and remained so until the passage of the Communications Act of 1934. Therefore, cases decided under the Interstate Commerce Act are controlling precedent in interpreting the Communications Act. *See, e.g., American Broadcasting Companies, Inc. v. FCC*, 643 F.2d 818, 821 (D.C. Cir. 1980).

state services against the inconsistent and overlapping state regulation permitted by the decision below.

Preemption

This Court has recognized that the Communications Act provides a "comprehensive scheme for the regulation of interstate communication." *Benanti v. United States*, 355 U.S. 96, 104 (1957). The pervasive regulatory scheme established by the Communications Act regulates not only the charges but "all . . . practices" of interstate carriers concerning their provision of interstate service. 47 U.S.C. § 201(b). In light of the Communications Act's comprehensive regulatory scheme, courts have repeatedly held that "the establishment of this broad scheme for the regulation of interstate service by communications carriers indicates an intent on the part of Congress to occupy the field to the exclusion of state law." *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486, 490 (2d Cir. 1968).[4]

The Second Circuit Court of Appeals recently reaffirmed that state law fraud claims challenging a carrier's charging and disclosure practices concerning interstate services are preempted by federal law. *Nordlicht v. New York Telephone Co.*, No. 86-7218 (2d Cir. Aug. 25, 1986) (available September 17, 1986, on LEXIS, Genfed library, Cir.

---

[4] *See Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 214-18 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *New York Telephone Co. v. FCC*, 631 F.2d 1059, 1064-65 (2d Cir. 1980); *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036, 1045-46 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *North Carolina Utilities Commission v. FCC*, 537 F.2d 787, 793 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *Lamb v. Sutton*, 164 F. Supp. 928, 934 (M.D. Tenn. 1958), *aff'd*, 274 F.2d 705 (6th Cir.), *cert. denied*, 363 U.S. 830 (1960); *Vaigneur v. Western Union Telegraph Co.*, 34 F. Supp. 92, 93-94 (E.D. Tenn. 1940).

file). In *Nordlicht*, plaintiff complained that the defendant carrier charged him for telephone service in American currency, when he should have been charged in Canadian currency, and failed to disclose this fact. The court held that these fraud claims are governed exclusively by federal law.

The charges and practices challenged in this case are also governed exclusively by federal law. Applying Sections 201(b) and 203 of the Communications Act, the FCC determined that this alleged conduct is a matter "within [its] expertise." *Bill Correctors, Ltd. v. MCI Telecommunications Corp.*, Dkt. No. E-84-11, at 5 (FCC 1984). The FCC's determination that the Communications Act applies to this conduct "should be followed unless there are compelling indications that it is wrong. . . ." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969).

The Illinois Supreme Court was wrong in concluding that the kind of conduct challenged here does not concern MCI's federally regulated charges and practices. Because this Court has held that the relationship between a carrier and its customers is governed by federally filed and regulated tariffs, not state contract law, *see, e.g., Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27 (1919), plaintiffs' breach of contract claim is a disguised challenge to MCI's federally regulated charges and practices. *See* 47 U.S.C. §§ 201(b), 203. Moreover, the FCC has plenary authority over telephone company disclosure practices,[5] particularly where the disclosure is integrally

[5] *Second Computer Inquiry*, 77 F.C.C.2d 384, 477, *modified*, 84 F.C.C.2d 50, 85 (1980), *aff'd sub nom. Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *see United States v. Western Electric Co.*, 531 F. Supp. 894, 901, 903 (D.N.J. 1981) (affirming FCC's authority to regulate telephone company advertising).

related to the charges themselves. 47 U.S.C. §§ 201, 203, 205. Thus, the decision below ignores the fact that plaintiffs directly challenge MCI's federally regulated charges, practices and tariffs; the link between non-tarriff and tariff disclosure; and the importance of avoiding inconsistent state regulation.[6]

The Illinois Supreme Court's asserted "fraud" exception to the preemption doctrine would overwhelm the rule. Any plaintiff could in effect attack the substance of federally regulated carrier practices by alleging that the carrier failed to disclose them adequately.[7] For example, an action for negligent installation and testing of telephone lines is governed exclusively by federal law, *Ivy Broadcasting Co.*, 391 F.2d at 491, but under the Illinois Supreme Court's analysis, plaintiffs could circumvent federal law by manipulating their pleadings to allege inadequate disclosure of service deficiencies.

To permit the jurisdictional hemisphere of the FCC to be invaded by artful pleading frustrates any hope of consistent federal control over the charging and disclosure

---

[6] Under the Communications Act, the FCC regulates all aspects of carrier tariffs, 47 U.S.C. §§ 201, 203; 47 C.F.R. § 61.55 (1984), and customers are charged with knowledge of all matters contained in the tariff as a matter of law. *E.g., Western Union Telegraph Co. v. Esteve Brothers & Co.*, 256 U.S. 566, 570 (1921). Because tariffs are an integral part of carrier disclosures to the public, non-tariff disclosures cannot be analyzed separately from tariff disclosures, which play a central role in the federal regulatory scheme. *See MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1192-95 (D.C. Cir. 1985).

[7] Plaintiffs' characterization of their claims is not determinative because "[i]t is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292 (1971).

practices of interstate telecommunications carriers.[8] Refunds for alleged non-disclosure would be no less extensive than those recoverable for alleged unreasonable billing practices. Regardless of the pleading label applied, the challenge has the same impact on the interstate rates and practices which are Congressionally committed to FCC regulation. Because this nationwide class action seeks refunds in addition to those MCI already provides for incorrectly billed calls, the varying refund obligations imposed under the laws of different states would inevitably cause state-by-state variations in MCI's rates. *See Vaigneur v. Western Union Telegraph Co.*, 34 F. Supp. 92, 93 (E.D. Tenn. 1940).

Thus, the state regulation of interstate carrier charges and practices permitted by the Illinois Supreme Court directly violates "the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act . . . to establish." *Postal Telegraph Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 30 (1919); *General Telephone Co. v. FCC*, 413 F.2d 390, 398 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969). This conflict with the federal regulatory scheme was concisely summarized by the court selected by the Judicial Panel on Multidistrict

---

[8] The inevitable interference with federal regulation is revealed by the Illinois Supreme Court's statement that "[t]he issue of whether defendant's failure to disclose certain charges is 'unjust or unreasonable' under section 201(b) of the Communications Act has no relevance as to whether defendant's failure to disclose those charges constituted fraud, a breach of contract, or a violation of Illinois' statutes." (App. A, at 15.) The Illinois Court expressly contemplates that MCI could be held liable under state law for conduct that the FCC affirmatively found to meet applicable requirements of federal law and which it may prescribe as the just and reasonable practice to be followed in the future. 47 U.S.C. § 205(a).

Litigation to hear all cases in the federal system challenging the charging and disclosure practices challenged here:

> To permit the possibility that defendants herein would be required to provide long distance service under differing sets of rules in different states would be to ignore Congress' recognition in the Communications Act of the need for comprehensive regulations as well as the practical difficulties inherent in state-by-state regulation of such an industry. The ultimate and inevitable losers in such a process would be the consumers which plaintiff seeks to represent.

Lazar v. MCI Communications Corp., 598 F. Supp. 951, 954 (E.D. Mich. 1984).

The Second Circuit, six federal district court decisions and prior decisions of this Court hold that "questions concerning the duties, charges and liabilities" of interstate carriers "are to be governed solely by federal law and that the states are precluded from acting in this area," *Ivy Broadcasting Co.*, 391 F.2d at 491. Because the decision below conflicts with these federal holdings, this Court should grant the writ.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

CHESTER T. KAMIN *
THOMAS S. MARTIN
RICHARD J GRAY
ANTHONY C. EPSTEIN
MELINDA S. LEVINE
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

21 Dupont Circle N.W.
Washington, D.C. 20036
(202) 223-4440

Attorneys for Petitioner

* Counsel of Record

September 18, 1986

APPENDIX A

KELLERMAN, et al., Appellees,

v.

MCI TELECOMMUNICATIONS CORPORATION, Appellant,

Phyllis HESSE, Appellee,

v.

MCI TELECOMMUNICATIONS CORPORATION, Appellant,

No. 62132

Supreme Court of Illinois,

May 21, 1986.

Justice THOMAS J. MORAN delivered the opinion of the court:

Plaintiffs, subscribers of defendant MCI's long-distance telephone service, brought these class action suits in the circuit court of Cook County alleging that certain advertisements, which described defendant's service charges, violate the Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. 1983, ch. 121½, par. 261 *et seq.*) and the Uniform Deceptive Trade Practices Act (Ill. Rev. Stat. 1983, ch. 121½, par. 311 *et seq.*). Plaintiffs also allege that defendant's advertising practices constitute a breach of contract and common law fraud. They seek damages and an accounting for themselves and other persons similarly situated.

After the cases were consolidated by the trial court, defendant moved to dismiss the actions, contending that the State-law claims are preempted by the Federal Communications Act of 1934 (Communications Act) (47 U.S.C. sec. 151 *et seq.* (1982)). Alternatively it requested that the court stay the actions and refer plaintiffs' claims to the Federal Communications Commission (FCC) based on the

doctrine of primary jurisdiction, or stay the actions pursuant to section 2-619(a)(3) of the Code of Civil Procedure (Ill. Rev. Stat. 1983, ch. 110, par 2-619(a)(3)). The trial court denied defendant's motion to dismiss or stay the actions. It also refused defendant's request to certify the preemption issue for interlocutory appeal. (See 87 Ill. 2d R. 308.) Thereafter, defendant appealed the denial of the stay. (87 Ill. 2d R. 307.) The appellate court, in addition to affirming the denial of the stay, determined that it had jurisdiction to consider the preemption issue even though the trial court had not certified the issue for interlocutory review. The appellate court held that plaintiffs' State-law claims are not preempted by the Communications Act. (134 Ill. App. 3d 71, 89 Ill. Dec. 51, 479 N.E.2d 1057.) We allowed defendant's petition for leave to appeal (94 Ill. 2d R. 315).

Defendant's principal contention is that plaintiffs' claims are preempted by the Communications Act (47 U.S.C. sec. 151 *et seq.* (1982)). Defendant asserts that the "comprehensive nature" of the Communications Act demonstrates that Congress "intended to occupy the entire field of interstate long distance telephone service." It argues that the conduct challenged by plaintiffs is "at the center of the occupied field" and that, therefore, plaintiffs' State-law claims are preempted. Plaintiffs contend, however, that their actions are not preempted, asserting that the only conduct being challenged is defendant's advertising practices and not the manner in which it provides interstate telephone service. Defendant raises two alternative arguments as to why this court should either dismiss or stay these actions. First, it contends that under the doctrine of primary jurisdiction the actions should be stayed and plaintiffs' claims referred to the FCC. Additionally, defendant requests that the suits be stayed pursuant to section 2-619(a)(3) of the Code of Civil Procedure (Ill. Rev. Stat. 1983, ch. 110, par. 2-619(a)(3)), asserting that there is a Federal action pending which involves the same parties and same cause.

The record shows that plaintiffs originally brought four separate actions against defendant in the circuit court. Three of the actions, filed by plaintiffs S. Kellerman, Bernard Turovitz and Louis T. Davis & Associates, Inc. (Davis), were consolidated by the trial court for all purposes. The action brought by Phyllis Hesse was consolidated with the other actions for pretrial purposes only. The allegations contained in all four complaints are substantially similar in that they attack certain of defendant's advertisements and promotional material as fraudulent and deceptive.

The advertisements and promotional material in question compare the cost of defendant's long-distance telephone service with the cost of a service provided by a competitor, American Telephone & Telegraph Company (AT & T). Plaintiffs allege that in order to induce them to purchase its service, defendant disseminated certain advertisements and promotional materials through various media which claimed that "although its rates are substantially lower" than AT & T's "its billing practices and procedures were identical to those of" AT & T. They allege that AT & T charges its customers only for completed calls and no charge is made to customers for calls which are initiated but not completed, i.e., where the recipient does not answer or the caller terminates the call before it is answered. In contrast, plaintiffs allege that defendant has billed its customers for uncompleted calls.

Plaintiffs, further allege that it was defendant's practice to impose a surcharge in situations where the telephone rang six or more times before it was answered—a charge not customarily imposed in the industry. It also is alleged that every time customers used defendant's service they paid a local telephone charge which AT & T customers did not have to pay. Plaintiffs do not challenge the reasonableness of the additional charges imposed by defendant, but only the fact that its advertising did not disclose that the additional charges would be made. It is alleged that through these advertisements and promotions, defendant "engaged in a course of conduct to falsely

represent to the plaintiff[s] and the general public that its practice and policy [were] * * * to bill its customers only for the actual time of communication during completed long distance calls" when in fact its practice was to bill its customers for uncompleted calls and to impose a surcharge when a telephone rang six or more times before it was answered. Plaintiffs allege that defendant's conduct constitutes common law fraud, a breach of contract, and that it violates the Uniform Deceptive Trade Practices Act (Ill. Rev. Stat. 1983, ch. 121½, par. 311 *et seq.*) and the Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. 1983, ch. 121½, par. 261 *et seq.*)

Before proceeding with the issues raised by defendant, we find it necessary to determine whether the preemption issue is properly before this court. Plaintiffs Kellerman, Turovitz and Davis contend that since the trial court refused to certify the preemption question for interlocutory appeal in accordance with Supreme Court Rule 308 (87 Ill. 2d R. 308), the appellate court did not have jurisdiction to consider it. As such, they assert that the issue is not properly before this court.

The appellate court, relying on this court's decision in *May Department Stores Co. v. Teamsters Union Local No. 743* (1976), 64 Ill. 2d 153, 355 N.E.2d 7, held that it had jurisdiction to consider whether plaintiffs' actions are preempted by the Communications Act. In *May*, store owners sought to enjoin a union from soliciting store employees and distributing union literature in the store's parking lot, claiming that the union's activities violated State criminal trespass laws. The union contended that Federal law preempted the authority of the State courts to issue an injunction barring its organizational activities on store property. The trial court granted the preliminary injunction, and the union perfected an interlocutory appeal pursuant to Rule 307. On appeal from the appellate court, this court viewed the union's preemption argument as a challenge to the State courts' authority to issue the preliminary injunction and, therefore, a proper subject on interlocutory appeal.

After reviewing the record in the present case in light of *May*, we believe that the appellate court was correct in finding that it had jurisdiction to address the preemption issue. Defendant's Federal preemption argument brings into issue the authority of the trial court to enter the order appealed from and, thus, the argument is properly considered on interlocutory appeal. Therefore, we will consider defendant's argument that plaintiffs' State-law actions are preempted by the Communications Act.

The preemption doctrine, which has its origin in the supremacy clause of the Federal Constitution (U.S. Const., art. VI, cl. 2), provides that Federal law will in some instances override or preempt State laws on the same subject. (*Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 229-31, 67 S. Ct. 1146, 1151-53, 91 L. Ed. 1447, 1459.) The key inquiry in all preemption cases is the objective or purpose of Congress in enacting the particular statute. The doctrine requires courts to examine the Federal statute in question to determine whether Congress intended it to supplant State laws on the same subject. (*Allis-Chalmers Corp. v. Lueck* (1985), 471 U.S. ____, ____, 105 S. Ct. 1904, 1910, 85 L. Ed. 2d 206, 213.) Generally this no easy task because rarely does Congress, in enacting legislation, expressly provide that concurrent State laws will be preempted. Rather, a court must usually divine for itself whether the statute evidences an intent by Congress to preempt State law.

Although there is no "rigid formula or rule which can be used" to determine if Congress intended Federal law to preempt plaintiffs' actions for fraud, deceptive advertising and breach of contract (*Hines v. Davidowitz* (1941), 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581, 587), our "consideration of that question is guided by familiar and well-established principles" (*Capital Cities Cable, Inc. v. Crisp*, (1984), 467 U.S. 691, 698, 104 S. Ct. 2694, 2700, 81 L. Ed. 2d 580, 588), which the Supreme Court has enumerated as follows:

> "Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be in-

ferred because '[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.' [Citation.]

Even where Congress has not completed displaced state regulation in a specific area, State law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' [citation] or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' * * *." *Fidelity Federal Savings & Loan Association v. De la Cuesta* (1982), 458 U.S. 141, 153, 102 S. Ct. 3014, 3022, 73 L. Ed. 2d 664, 675.

The express purpose of the Communications Act (47 U.S.C. sec. 151 *et seq.* (1982)) is to "make available, so far as possible, to all the people of the United States a rapid, efficient * * * communication service with adequate facilities at reasonable charges." (47 U.S.C. sec. 151 (1982).) To that end, the Act applies "to all interstate and foreign communication by wire or radio * * * and to all persons engaged within the United States in such communication" (47 U.S.C. sec. 152(a) (1982)), and provides that an interstate telephone carrier's "charges, practices, classifications, and regulations for and in connection with [its] communication service, shall be just and reasonable." (47 U.S.C. sec. 201(b) (1982).) Under section 206, any carrier which violates a provision of the Act is liable "to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation." (47 U.S.C. sec. 206 (1982).) An injured party may file a complaint against the carrier with the FCC (47 U.S.C.

sec. 207 (1982)), which has the power "to investigate the matters complained of" (47 U.S.C. sec. 208 (1982)), and to award damages when appropriate (47 U.S.C. sec. 209 (1982).) Alternatively, an aggrieved party can file an action against the carrier in Federal district court. 47 U.S.C. sec. 207 (1982).

Defendant essentially makes two arguments as to why plaintiffs' actions are preempted by the Communications Act. First, it argues that the "comprehensive nature" of the Act, as briefly outlined above, demonstrates that Congress "intended to occupy the entire field of long distance telephone service" to the exclusion of State law. It asserts that the conduct challenged here falls within the broad field of interstate long-distance telephone service, and, hence, is preempted. Defendant's second argument is much narrower. While conceding for purposes of argument that the Act may not preempt all State regulation of long-distance telephone carriers, it contends that the Act specifically governs a carrier's "charges, practices and tariffs." Defendant maintains that plaintiffs, although "artfully emphasizing advertising and state law theories of liability," in reality are challenging "FCC-regulated charges, practice and tariffs." It argues that since plaintiffs are attacking "charges, practices and tariffs" regulated by Federal law, the State-law actions are preempted by the Act.

While we agree with defendant that the Communications Act represents a "broad scheme for the regulation of interstate service by communications carriers" (*Ivy Broadcasting Co. v. American Telephone & Telegraph Co.* (2d Cir. 1968), 391 F.2d 486, 490), we cannot agree that Congress intended to supplant all State regulation of interstate telephone carriers, no matter how unrelated the State regulation is from Congress' objective of creating an interstate telephone network that is rapid, efficient and reasonably priced. The Act contains a saving clause which provides that "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this

chapter are in addition to such remedies." (47 U.S.C. sec. 411 (1982).) Thus, to argue, as defendant has, that Congress has "occupied the field of interstate long distance telephone service" does not answer the question of whether these particular State-law actions are preempted by the Act. Rather, as the appellate court in this case keenly observed, the relevant inquiry is what are the "precise contours" of the field that Congress has chosen to occupy. 134 Ill. App. 3d 71, 74, 89 Ill. Dec. 51, 479 N.E.2d 1057.

Little guidance can be gleaned from the Communications Act itself, and few cases have discussed Federal preemption with respect to the Act. In *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.* (2d Cir. 1968), 391 F. 2d 486, the court concluded that an action against two telephone companies for the negligent "installation and testing" of telephone lines was governed exclusively by Federal common law. The court, reasoning that the "congressional purpose of uniformity and equality of rates should be taken to imply uniformity and equality of service," stated that "questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law." (391 F. 2d 486, 491.) The *Ivy* court, however, did not discuss the scope of the saving clause of the Act, section 414 (47 U.S.C. sec. 414 (1982)). Subsequent cases have viewed section 414 as "preserving causes of action for breaches of duties distinguishable from those created under the Act." *Comtronic, Inc. v. Puerto Rico Telephone Co.* (1st Cir. 1977), 553 F. 2d 701, 707-08 n. 6.

In *Ashley v. Southwestern Bell Telephone Co.* (W.D. Tex. 1976), 410 F. Supp. 1389, the court, relying on section 414 of the Act, held that a State-law action brought against an FCC-regulated carrier for invasion of privacy was not preempted by the Act. Similarly, in *Bruss Co. v. Allnet Communication Services, Inc.* (N.D. Ill. 1985), 606 F. Supp. 401, a case closely analogous to the case at bar, the court held that State-law claims alleging common law fraud and violations of Illinois' deceptive trade and

consumer fraud acts were not preempted by the Act. In that case, it was alleged that the defendants had charged plaintiffs and other long-distance customers rates in excess of the tariffs filed with the FCC. The court, reasoning that the State claims "challenge[d] conduct that is not contemplated by the Communications Act," held that the actions were preserved under section 414. 606 F. Supp. 401, 411.

In interpreting a statutory provision, courts " 'will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute * * * and the objects and policy of the law.' " (*Stafford v. Briggs* (1980), 444 U.S. 527, 535, 100 S. Ct. 774, 780, 63 L. Ed. 2d 1, 9.) Therefore, it is implausible to think that section 414 of the Act preserved all State-law remedies affecting interstate telephone carriers no matter how repugnant those State laws are to the purposes and objectives of Congress. It is reasonable to presume that State laws which interfere with Congress' objective of creating "a rapid, efficient, Nation-wide, * * * communication service with adequate facilities at reasonable charges" (47 U.S.C. sec. 151 (1982)), such as State attempts to regulate interstate carriers' charges or services, would be preempted by the Act. (See, e.g., *Komatz Construction, Inc. v. Western Union Telegraph Co.* (1971), 290 Minn. 129, 186 N.W. 2d 691 (action against telegraph company for damages caused by delay in transmission of telegram is governed by Federal law).) However, we believe that section 414, when considered in the context of the entire act, should be construed as preserving State-law "causes of action for breaches of duties distinguishable from those created under the Act." (*Comtronics, Inc. v. Puerto Rico Telephone Co.* (1st Cir. 1977), 553 F. 2d 701, 708.) State-law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414.

Defendant argues that plaintiffs, while "artfully" pleading fraud and deceptive-advertising claims, in reality "seek recovery for federally regulated charges." As such, it asserts that plaintiffs' actions are preempted by the Act. Although a similar argument has prevailed in at least one Federal district court (see *In re Long Distance Telecommunications Litigation* (E.D. Mich. 1984), 598 F. Supp. 951), we think the better view is that plaintiffs' actions are not preempted by the Act. (See *Bruss Co. v. Allnet Communication Services, Inc.* (N.D. Ill. 1985), 606 F. Supp. 401.) The subject matter of plaintiffs' complaints involves neither the quality of defendant's service nor the reasonableness and lawfulness of its rates. Plaintiffs only allege that defendant disseminated fraudulent and deceptive advertisements concerning the cost of its long-distance telephone service. As such, plaintiffs seek to hold defendant to the same standards as they would any other business which advertises on a nationwide basis and which, in the course of its business, is subject to regulation from a number of Federal and State agencies. Moreover, these actions do not present "an obstacle to the accomplishment" of the Federal policy of promoting a "rapid, efficient * * * communication service with adequate facilities at reasonable charges." (47 U.S.C. sec. 151 (1982).) The prosecution of these claims will in no way interfere with the delivery of long-distance telephone services to defendant's customers, and any possible effect the litigation could have on defendant's telephone rates is speculative at best. Finally, no Federal statute or regulation has been brought to our attention which would expressly prohibit these actions. Therefore, we find that Congress did not intend to occupy the field of interstate telephone service to the extent of barring these State-law claims for fraud, breach of contract and deceptive practices, and hold that plaintiffs' actions are not preempted.

Alternatively, defendant argues that the doctrine of primary jurisdiction requires these actions to be stayed pending review of the claims by the FCC.

The doctrine of primary jurisdiction is "concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." (*United States v. Western Pacific R.R. Co.* (1956), 352 U.S. 59, 63, 77 S.Ct. 161, 165, 1 L.Ed.2d 126, 132.) The doctrine provides that even when a court has jurisdiction over a matter, it should in some instances stay the judicial proceedings pending referral of the controversy, or a portion of it, to an administrative agency having expertise in the area. (*Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 303-04, 96 S.Ct. 1978, 1986-87, 48 L.Ed.2d 643, 654-55.) The Supreme Court, in *Far East Conference v. United States* (1952), 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576, described the doctrine as follows:

> "[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." (342 U.S. 570, 574-75, 72 S.Ct. 492, 494, 96 L.Ed. 576, 582.)

Thus, under the doctrine a matter should be referred to an administrative agency when it has a specialized or technical expertise that would help resolve the controversy, or when there is a need for uniform administrative standards. (*United States v. Western Pacific R.R. Co.* (1956), 352 U.S. 59, 64, 77, S.Ct. 161, 165, 1 L.Ed.2d 126, 132.) Conversely, when an agency's technical expertise is not likely to be helpful, or there is no need for uniform

administrative standards, courts should not relinquish their authority over a matter to the agency. *Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 304, 96 S.Ct. 1978, 1987, 48 L.Ed.2d 643, 655.

In *Nader*, the plaintiff was "bumped" from a flight because the defendant airline, as was the industry custom, had overbooked the flight. Civil Aeronautics Board (CAB) regulations required airlines to offer "denied boarding compensation" to bumped passengers. Instead of accepting the offered compensation, however, the plaintiff brought a common law action in Federal district court, alleging that the airline's failure to inform him in advance of its overbooking practices constituted a fraudulent misrepresentation. The district court found for the plaintiff, but the court of appeals reversed, holding that the doctrine of primary jurisdiction required referral of the matter to the CAB so that the agency could determine whether the airline's failure to disclose the overbooking practice was "deceptive" within the meaning of section 411 of the Federal Aviation Act of 1958 (49 U.S.C. sec. 1381 (1970).) The Supreme Court in *Nader* reversed, concluding that "considerations of uniformity in regulation and of technical expertise do not call for prior reference to the Board." (426 U.S. 290, 304, 96 S.Ct. 1978, 1987, 48 L.Ed.2d 643, 655.) The court explained that the plaintiff's common law action for fraudulent misrepresentation did not challenge the propriety or reasonableness of the overbooking practice, and thus, an "informed evaluation of the economics or technology of the regulated industry" was not likely to be helpful in resolving the case. (426 U.S. 290, 305-06, 96 S.Ct. 1978, 1987, 48 L.Ed.2d 643, 656.) Moreoever, the court observed that the "standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts." 426 U.S. 290, 305, 96 S.Ct. 1978, 1987, 48 L.Ed.2d 643, 656.

Our review of the above authorities, particularly the *Nader* case, convinces us that referral of these actions to the FCC is not required by the primary-jurisdiction doctrine. Like the plaintiff in *Nader*, the plaintiffs here do

not contest the reasonableness or lawfulness of defendant's charges or billing practices, but only seek recovery for defendant's failure to disclose certain facts. In resolving the dispute it will not be necessary to evaluate "the economics or technology of the regulated industry" (*Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 305, 96 S.Ct. 1978, 1987, 48 L.Ed.2d 643), and, thus, we see little benefit, if any, in referring plaintiffs' claims to the FCC. Plaintiffs allege common law claims and violations of State statutes. The legal and factual issues that are involved in these cases are standard fare for judges, and, consequently, must be deemed to be "within the conventional competence of the courts." (*Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 305-06, 96 S.Ct. 1978, 1987, 48 L.Ed.2d 643, 656.) Therefore, we reject defendant's argument that the primary-jurisdiction doctrine requires that these actions be stayed pending referral to the FCC.

Defendant's final contention is that the trial court should have stayed these actions pursuant to section 2-619(a)(3) of the Code of Civil Procedure (Ill. Rev. Stat. 1983, ch. 110, par. 2-619(a)(3).) Section 2-619(a)(3) allows a defendant to move for a dismissal or stay whenever "there is another action pending between the same parties for the same cause." (Ill. Rev. Stat. 1983, ch. 110, par. 2-619(a)(3).) Defendant claims that a class action suit that is pending in the United States District Court for the Eastern District of Michigan involves the "same cause" and "same parties".

Section 2-619(a)(3) is designed to avoid duplicative litigation and is to be applied to carry out that purpose. (*People ex rel. Department of Public Aid v. Santos* (1982), 92 Ill.2d 120, 127, 65 Ill. Dec. 21, 440 N.E.2d 876; *People ex rel. Phillips Petroleum Co. v. Gitchoff* (1976), 65 Ill.2d 249, 255, 2 Ill. Dec. 367, 357 N.E.2d 534.) Nevertheless, even when the "same cause" and "same parties" requirements are met, section 2-619(a)(3) does not mandate automatic dismissal. Rather, the decision to grant or deny defendant's section 2-619(a)(3) motion is discretionary with the trial court. (*People ex rel. Department of Public Aid*

v. Santos (1982), 92 Ill.2d 120, 125, 65 Ill. Dec. 21, 440 N.E.2d 876.) "The more reasonable construction [of section 2-619(a)(3)] is that the circuit court possesses some degree of discretion in ruling upon the motion and that multiple actions in different jurisdictions, but arising out of the same operative facts, may be maintained where the circuit court, in a sound exercise of its discretion, determines that both actions should proceed." *A. E. Staley Manufacturing Co. v. Swift & Co.* (1980), 84 Ill.2d 245, 252-53, 50 Ill. Dec. 156, 419 N.E.2d 23.

The factors that a court should consider in deciding whether a stay under section 2-619(a)(3) is warranted include: comity; the prevention of multiplicity, vexation, and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and the *res judicata* effect of a foreign judgment in the local forum. (*People ex rel. Department of Public Aid v. Santos* (1982), 92 Ill.2d 120, 130, 65 Ill. Dec. 21, 440 N.E.2d 876; *A. E. Staley Manufacturing Co. v. Swift & Co.* (1980), 84 Ill.2d 245, 254, 50 Ill. Dec. 156, 419 N.E.2d 23.) Our review of the record in this case shows that the trial judge properly considered the above factors in deciding that a stay was inappropriate, and we find no abuse of discretion.

We note that following the trial court's refusal of defendant's section 2-619(a)(3) motion, the plaintiffs in the Federal case pending in Michigan filed a consolidated complaint. The Federal district court subsequently dismissed the Federal common law claims and referred the remaining claims, based on the Communications Act, to the FCC. (In re Long Distance Telecommunication Litigation (E.D. Mich. 1985), 612 F.Supp. 892.) This subsequent action in the Federal court is of no consequence, because all of the reasons that the trial court originally found persuasive in denying the stay are just as applicable, if not more so, now. None of the counts remaining in the Federal action allege common law claims for fraud or breach of contract, or claims based on Illinois' deceptive trade and consumer fraud statutes, but relate only to whether defendant's failure to disclose its charges constitutes a violation of sec-

tion 201(b) (47 U.S.C. sec. 201(b)) of the Communications Act. The issue of whether defendant's failure to disclose certain charges is "unjust or unreasonable" under section 201(b) of the Communications Act has no relevance as to whether defendant's failure to disclose those charges constituted fraud, a breach of contract, or a violation of Illinois' statutes. While some of the same documentary evidence may be used in both cases, the lawsuits involve entirely different theories and litigation strategies. Thus, considerations of comity, multiplicity and *res judicata* do not persuade us that these actions should be stayed. Moreover, as the trial judge observed, these actions were among the first to be filed in the country, and consequently, it cannot be argued that the actions were filed with a vexatious purpose or with the intent to harass defendant. Thus, we find that the refusal to grant a stay pursuant to section 2-619(a)(3) was not an abuse of discretion.

For the reasons stated, the judgment of the appellate court is affirmed.

Judgment affirmed.

Justice SIMON took no part in the consideration or decision of this case.

APPENDIX B

62132 ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, IL 62706
(217) 782-2035

October 2, 1985

Mr. Chester T. Kamin
Jenner & Block
One IBM Plaza
Chicago, IL 60611

No. 62131 – S. Kellerman, etc., et al., respondents, v. MCI Telecommunications Corporation, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today ALLOWED the petition for leave to appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(g) concerning certain notices which must be filed.

APPENDIX C

KELLERMAN, d/b/a Authorized Sales and Service *et al.*, Plaintiffs-Appellees, v. MCI TELECOMMUNICATIONS CORPORATION, Defendant-Appellant.

First District (1st Division) No. 84-2877

Order affirmed and cause remanded.

Opinion filed June 3, 1985.

JUSTICE BUCKLEY delivered the opinion of the court:

In four separate but now consolidated actions, plaintiffs brought State law challenges to certain advertising practices of MCI Telecommunications Corporation (MCI), alleging violations of Illinois' Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. 1983, ch. 121½, par. 261 *et seq.*), the Uniform Deceptive Trade Practices Act (Ill. Rev. Stat. 1983, ch. 121½, par. 311 *et seq.*), common law fraud, and breach of contract. MCI moved to stay or dismiss the actions pursuant to section 2-619 of the Illinois Code of Civil Procedure (Ill. Rev. Stat. 1983, ch. 110, par. 2-619), arguing the actions were preempted by Federal law and, in the alternative, that the trial court should defer to the Federal Communications Commission or to ongoing Federal cases "between the same parties for the same cause." The trial court denied the motion to dismiss on Federal preemption and primary jurisdiction grounds and refused to stay proceedings. MCI perfected an interlocutory appeal from the denial of the stay order pursuant to Supreme Court Rule 307. (87 Ill. 2d R. 307.) MCI also sought to have the preemption issue certified for review pursuant to Supreme Court Rule 308 but the trial court denied this motion. (87 Ill. 2d R. 308.) We affirm.

The record reveals that all plaintiffs are subscribers of MCI's long-distance telephone service. The complaints allege that defendant engaged in a practice of billing its

customers for long-distance calls which were initiated but never completed because the recipient failed to answer or the caller aborted the call before it was completed. The complaints further allege that defendant billed its customers an extra minute or more in addition to actual communication time where the phone rang six or more times before it was answered. Finally, one of the complaints alleges that MCI customers must pay a local call charge to the local telephone company servicing the location in addition to the charges paid to MCI for a long-distance call and that MCI lacked the "capacity" to provide service of comparable quality to AT&T. Plaintiffs do not challenge defendant's practice of imposing these charges or their reasonableness or amount. Rather, plaintiffs allege that MCI's failure to disclose these billing practices, when coupled with the fact of a longstanding industry practice of not imposing such charges, amounts to a fraudulent misrepresentation of material fact sounding in tort as well as a violation of Illinois' Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. 1983, ch. 121½, par. 261 *et seq.*). Plaintiffs seek damages and an accounting on behalf of themselves and others similarly situated.

A threshold issue of appellate jurisdiction and scope of review is raised by this interlocutory appeal. Case law has clearly established that a denial of a motion to stay is appealable as of right under Supreme Court Rule 307(a)(1). (*Metropolitan Sanitary District v. United States Steel Corp.* (1975), 30 Ill. App. 3d 360, 361, 332 N.E.2d 426.) However, in an interlocutory appeal, the scope of review is normally limited to an examination of whether or not the trial court abused its discretion in granting or refusing the requested interlocutory relief. (See *Peoples Gas Light & Coke Co. v. City of Chicago* (1983), 117 Ill. App. 3d 353, 358, 453 N.E.2d 740.) MCI contends that the issue of Federal preemption of these State law claims is properly before us even though the issue was not certified for review by the trial court pursuant to Supreme Court Rule 308. We agree, finding the resolution of this issue controlled by the result in *May Department Stores*

Co. v. Teamsters Union Local No. 743 (1976), 64 Ill. 2d 153, 355 N.E.2d 7. There, the trial court had issued a temporary injunction and, as in the present case, the defendant perfected an interlocutory appeal arguing that Federal law "preempted the authority of the circuit court *** to issue an injunction." (64 Ill. 2d 153, 157.) Our supreme court found that the question of preemption constituted a challenge to the jurisdiction of the trial court to enter the order appealed from and was therefore properly addressed on interlocutory review. Similarly, defendant's preemption argument in the present appeal challenges the trial court's jurisdiction to hear the causes pending before it and may therefore be properly considered on interlocutory appeal from a trial court order refusing to stay its own proceedings. (*Cf. Eastern v. Canty* (1979), 75 Ill. 2d 566, 389 N.E.2d 1160 (where the trial court's jurisdiction to proceed in a case after a petition for removal was filed in Federal district court was addressed on appeal).) Accordingly, we reject plaintiffs' contentions to the contrary and deny their motions to strike those portions of defendant's brief addressing the Federal preemption issue.

It is well established that there are three separate and independent grounds for Federal preemption of State law:

> "[F]irst, when Congress, in enacting a federal statute, has expressed a clear intent to preempt state law [citation]; second, when it is clear, despite the absence of explicit pre-emptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has thereby 'left no room for the States to supplement' federal law [citation]; and, finally, when compliance with both state and federal law is impossible [citation] or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (*Capital Cities Cable, Inc. v. Crisp* (1984), 467 U.S. ____, ____, 81 L. Ed. 2d 580, 588-89, 104 S. Ct. 2694, 2700.)

MCI bases its preemption argument on the second ground, where Congress has intended, by legislating comprehensively, to occupy an entire field of regulation. However, little aid can be derived from the vague and illusory but often repeated formula that Congress "by occupying the field" has excluded from it all State legislation. Every act of Congress may occupy some field to a greater or lesser extent, but we must know the boundaries of that field before we can say it has precluded State regulation.

To that end, we must first examine the provisions of the Federal statute claiming to preempt State regulation. Congress enacted the Federal Communications Act of 1934 (47 U.S.C. sec. 151 *et seq.* (1982)) "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available *** a rapid efficient *** communication service with adequate facilities at reasonable charges." (47 U.S.C. sec. 151 (1982).) The Communications Act specifies that MCI's "charges, practices, classifications, and regulations for and in connection with [its] communication service, shall be just and reasonable." (47 U.S.C. sec. 201(b) (1982).) The Communications Act also establishes a procedure under which complaints arising under the Act may be brought before the Federal Communications Commission (FCC) and adjudicated or, in the alternative, an action may be filed in Federal district court. (47 U.S.C. secs. 206 through 209 (1982).) Moreover, the Act confers regulatory jurisdiction over tariffs on the FCC. (47 U.S.C. sec. 203 (1982).) Finally, section 414 of the Act provides that "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. sec. 414 (1982).

Defendant cites *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.* (2d Cir. 1968), 391 F.2d 486, for the proposition that "the establishment of this broad scheme for the regulation of interstate service by communications carriers indicates an intent on the part of Congress to occupy the field to the exclusion of state

law." (391 F.2d 468, 490.) However, it is clear that the Communications Act does not preempt every State law cause of action which can be brought against a carrier regulated by the FCC. (See *Ashley v. Southwestern Bell Telephone Co.* (W.D. Tex. 1976), 410 F. Supp. 1389.) For example, even MCI concedes that a party may sue it in State court for injuries negligently caused by the actions of one of its truck drivers. Moreover, the savings clause contained in section 414 of the Act would be rendered meaningless if all actions against carriers were preempted. The problem, then, is not resolved by citing cases which hold that Congress has "occupied the field." It is the precise contours of that field which must be determined.

We believe the facts surrounding *Ivy Broadcasting*, a case heavily relied upon by defendant, are particularly instructive. There, plaintiff brought a State law action against several telephone companies for negligence and breach of contract *in the rendition of interstate telephone service*. Specifically, plaintiff, a broadcasting network of six radio stations, alleged that it had engaged the defendant telephone companies to provide telephone hookups used in connection with the plaintiff's broadcasts of several football games and political conventions. The complaint further alleged grossly negligent and unreasonably delayed installation and operation of these special telephone lines, resulting in noisy broadcasts, interruptions and the transmission of wrong material. After thoroughly examining prior precedent to determine whether State law claims could be brought against the defendant communications carriers, the court held:

> "These cases lead us to conclude that questions concerning the duties, charges and liabilities of telegraph or telephone companies *with respect to interstate communications service* are to be governed solely by federal law and that the states are precluded from acting in this area. Where neither the Communications Act itself nor the tariffs filed pursuant to the Act deals with a particular question, the courts are to apply a uniform rule of federal common law." (Emphasis added.) (391 F.2d 486, 491.)

Thus, it is only a carrier's duties and liabilities with respect to the rendition of interstate communications service that are governed exclusively by Federal law. The rationale advanced in *Ivy Broadcasting* was that, in order to implement the congressional purpose of uniform rates and services, nationwide standards for the actual rendition of telecommunications service were necessary and could only be achieved through the application of uniform Federal law to these disputes. 391 F.2d 486, 491.

The other cases cited by defendant support our conclusion above. In virtually every case, the plaintiff brought a State law action against a communications carrier complaining of some practice engaged in by the carrier with respect to the rendition of communications service. (*Western Union Telegraph Co. v. Boegli* (1920), 251 U.S. 315. 64 L. Ed. 281, 40 S. Ct. 167 (negligent failure to promptly deliver a telegram); *Postal Telegraph-Cable Co. v. Warren Godwin Lumber Co.* (1919), 251 U.S. 27, 64 L. Ed. 118, 40 S. Ct. 69 (negligence with respect to unrepeated messages); *O'Brien v. Western Union Telegraph Co.* (1st Cir. 1940), 113 F.2d 539 (transmission of a libelous message); *Komatz Construction, Inc. v. Western Union Telegraph Co.* (1971), 186 N.W.2d 691, *cert. denied* (1971), 404 U.S. 856, 30 L. Ed. 2d 98, 92 S. Ct. 102 (delayed transmission of a telegram).) In each instance, the court found that the application of State law to these types of disputes would result in carriers having different obligations to their customers in different States with respect to the rendition of communications service. In effect, allowing these State law claims would result in individual States controlling the manner in which communications service would be provided to the public. All the courts addressing this issue held that the need for uniform service standards required rejection of these State law claims based upon Federal preemption.

In the present cases, the question of Federal preemption is then reduced to an examination of whether or not plaintiffs' lawsuits seek to determine MCI's duties and liabilities with respect to rendition of interstate telecom-

munications service. Here, we do not believe plaintiffs' State law claims seek to regulate the manner in which defendant provides communications service to the public. Rather, they seek to regulate defendant's advertising practices in the solicitation of customers and ask that damages be awarded for past abuses. Nowhere in plaintiffs' complaints do they attack the lawfulness of MCI's billing practices *per se*. Indeed, such an attack on State law grounds would be preempted by Federal law under *Ivy Broadcasting* as an attempt to regulate a common carrier in the rendition of interstate communications service. Specifically conceding, for purposes of this litigation, that MCI may render service in the manner that it does, plaintiffs' complaints address MCI's practice of favorably comparing its rates to those of American Telephone & Telegraph (AT&T) through various advertising media, while failing to disclose that MCI customers are subject to charges which AT&T customers are not. The issues raised by the pleadings are ones of public disclosure and truthful advertising; they do not challenge MCI's right to provide communications service in the manner that it does.

MCI also cites several recent trial court decisions, holding that State false-advertising claims, such as the ones presented here, are preempted by Federal law. However, none of these decisions thoroughly reviewed the existing case law regarding Federal preemption in this area in an effort to define the precise boundaries of the field occupied by Congress. If they had, we believe they would have concluded, as we have, that the limits of Federal preemption extend only to those areas relating to the rendition of communications service by carriers. As previously discussed, Federal preemption in this area is predicated on the overriding need for uniform standards in the rendition of communications service in order to effect the congressional purpose of providing uniform and equal telecommunications service throughout the United States. (See *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.* (2d Cir. 1968), 391 F.2d 486, 491.) We do not find that there is a similar need for uniform advertising

standards, nor do we believe Congress intended to impose such standards to the exclusion of State law requirements. The application of State advertising law to these disputes will not result in differing service requirements from State to State, nor will it result in each State regulating the manner in which communications service is rendered to the public. Rather, MCI and other communications carriers will merely be subject to certain State law restrictions with respect to their advertising practices. Thus, defendant will be put in the same position as any other company that chooses to advertise its products or services on a nationwide basis. Accordingly, we find that plaintiffs' claims based on fraud and deceptive advertising are not within the field occupied by Congress and are therefore not preempted by Federal legislation. Since the trial court clearly had jurisdiction to hear these cases, an alternative ground for reversal must be found if the trial court's ruling on the motion to stay is to be overturned.

MCI next contends that plaintiffs' claims should be stayed under the doctrine of primary jurisdiction because the FCC is the appropriate forum to consider the claims. We disagree.

The doctrine of primary jurisdiction is premised on the theory that, in order to properly integrate the functions of administrative agencies and the courts, consideration must be given to whether the relevant administrative agency should initially pass on the controversy. (*Mississippi Power & Light v. United Gas Pipeline Co.* (5th Cir. 1976), 532 F.2d 412, 417-19.) Referrals to administrative agencies are appropriate in the following circumstances: (1) if the agency could provide immunity to the defendant's actions; (2) where the issues involve technical questions within the particular competence of the administrative agency; or (3) where an administrative decision would promote uniformity in regulation throughout the country. *Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 48 L. Ed. 2d 643, 96 S. Ct. 1978.

The facts of the present cases closely parallel those found in *Nader*. There, the plaintiff got "bumped" from

his plane flight because of overbooking, and he filed an action based on common law fraud and a Federal statutory action for the airline's failure to disclose the overbooking practice. The Supreme Court considered the issue of whether or not the trial court should stay its proceedings under the doctrine of primary jurisdiction pending an initial determination by the Civil Aeronautics Board on whether the practice was deceptive. The court rejected the primary jurisdiction argument, distinguishing between situations in which deferral to an agency "would secure uniformity and consistency in the regulation of business entrusted to a particular agency" or which "involve technical questions of fact uniquely within the expertise and experience of an agency" (426 U.S. 290, 304, 48 L. Ed. 2d 643, 655, 96 S. Ct. 1978, 1987), from the situation before it, finding:

> "The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice—a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry. The standards to be applied in an action for fraudulent misrepresentation *are within the conventional competence of the courts*, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case." (Emphasis added.) *Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 305-06, 48 L. Ed. 2d 643, 656, 96 S. Ct. 1978, 1987-88.

Here, too, plaintiffs' actions do not turn on a determination of the reasonableness of a challenged practice relating to the delivery of telecommunications service, a matter within the peculiar expertise of the FCC. As in *Nader*, the standards to be applied to the instant cases are those relating to fraudulent misrepresentation and deceptive advertising and are well within the conventional competence of the courts. Also, the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of these cases. Accordingly, we find no abuse of discretion in the trial court's

refusal to stay its proceedings on the grounds of primary jurisdiction.

Finally, MCI argues that the trial court should have stayed these proceedings pursuant to section 2-619(a)(3) of the Illinois Code of Civil Procedure (Ill. Rev. Stat. 1983, ch. 110, par. 2-619(a)(3)) in deference to pending consolidated Federal actions "between the same parties for the same cause." We disagree.

Section 2-619(a)(3) provides that a defendant may move for dismissal or other appropriate relief on the ground "that there is another action pending between the same parties for the same cause." Defendant contends that the "same parties" requirement is met here because plaintiffs are potential members of a class in consolidated class actions currently pending in the United States District Court for the Eastern District of Michigan. (See *Anagnost v. Hammond Corp.* (1979), 73 Ill. App. 3d 667, 392 N.E.2d 355.) MCI also argues that the "same cause" requirement has been met because the relief requested here is on substantially the same state of facts as the relief requested in the Federal cases. (See *Skolnick v. Martin* (1964), 32 Ill. 2d 55, 203 N.E.2d 428, *cert. denied* (1965), 381 U.S. 926, 14 L. Ed. 2d 684, 85 S. Ct. 1562.) Assuming, *arguendo*, that the "same parties, same cause" requirements have been met here, we find no abuse of discretion in the trial court's denial of the motion to stay.

It is well established that the grant or denial of a motion to dismiss or stay under section 2-619(a)(3) is discretionary with the trial court and the court can, in the exercise of that discretion, deny such a motion and permit multiple actions between the same parties. (*A.E. Staley Manufacturing Co. v. Swift & Co.* (1980), 84 Ill. 2d 245, 419 N.E.2d 23; *People ex rel. Fahner v. Climatemp, Inc.* (1981), 101 Ill. App. 3d 1077, 1084, 428 N.E.2d 1096.) Here, defendant would have the trial court defer to the actions pending in Federal district court where it was held that State law causes of action, like the ones presented in the instant cases, are preempted by Federal law. Since we

believe the district court's decision is in error with respect to the preemption issue, we find no abuse of discretion in the trial court's refusing to stay its own proceedings in deference to the Federal district court proceedings.

In view of the foregoing, the order of the trial court denying MCI's motion to stay is affirmed and the cause is remanded for further proceedings.

Affirmed and remanded for further proceedings.

CAMPBELL and O'CONNOR, JJ., concur.

APPENDIX D

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT–CHANCERY DIVISION

I. KELLERMAN, d/b/a AUTHORIZED SALES & SERVICE; LOUIS T. DAVIS & ASSOCIATES, INC.; and BERNARD TUROVITZ,

Plaintiffs,

82 CH 11065 v.

MCI TELECOMMUNICATIONS CORP.,

Defendant.

PHYLLIS HESSE,

Plaintiff,

83 CH 6485 v.

MCI TELECOMMUNICATIONS CORP.,

Defendant.

(Cons. for Pretrial Purposes)

MEMORANDUM OF LAW AND ORDER

Defendant MCI Telecommunications Corporation (hereinafter MCI), moves to dismiss the Consolidated Complaint and the Hesse Complaint with prejudice pursuant

to § 2-619(a)(1) and (9) of the Illinois Code of Civil Procedure. MCI argues that federal regulation of communication systems preempts state common law contract and tort actions and state statutory actions for fraud and deceptive advertising. In the alternative, Defendant moves to dismiss or stay without prejudice both under § 2-619(a)(9), claiming that the Federal Communications Commission (hereinafter FCC) has primary jurisdiction in this case, and under § 2-619(a)(3), claiming that other actions pend between the same parties and for the same cause.

BACKGROUND

A brief procedural history of this case is required for a full understanding of its current posture and of the issues raised. In December of 1982 Plaintiff Kellerman filed a class action in the Circuit Court of Cook County, Illinois. MCI removed the case to the Northern District of Illinois. In August of 1983 Hesse filed her Complaint against MCI, which was also removed to federal court. The Kellerman case was remanded by Judge Parsons in August, 1983, in part because he was convinced that the "non-federal case" revealed no subject matter jurisdiction. Memorandum Order of August 18, 1983, p. 3. Thereafter, in November, 1983, MCI and Hesse entered into an agreement which, pursuant to Judge Leighton's Order, sent the case back to state court. Turovitz filed his case later in November, and in December, Davis was given leave to intervene in Kellerman's action. In April of 1984, Turovitz' case was consolidated with Kellerman/Davis for all purposes (hereinafter Consolidated Complaint) and Hesse's case (hereinafter Hesse Complaint) was consolidated with the Consolidated Complaint for all pre-trial purposes.

Hesse's Complaint alleges that, in contradiction to its advertising, MCI's billing procedure was different than that of the Bell System. MCI allegedly bills for uncompleted long-distance calls and for ringing time. The Complaint charges that the advertising constituted deceptive acts under the Illinois Consumer Fraud and Deceptive

Business Practices Act (Ill. Rev. Stats. ch. 121½ § 261, *et seq.*) and under common law fraud theories. Hesse requests class certification, accounting for the disputed billing, damages and fees.

The Consolidated Complaint alleges MCI's statutory liability under Ill. Rev. Stats. ch. 121½ § 261, *et seq.* and under § 311 *et seq.* to an Illinois class. It also alleges common law fraud liability to a national class for deceptively comparing its long-distance rates and services to those of the Bell System when they were in fact not comparable. The Complaint alleges that MCI in certain situations charges its long-distance users for local hookups as well as for the long-distance charges. MCI also allegedly charges for unanswered calls and has less capacity and poorer service than Bell. Plaintiffs also purport to represent national and Illinois classes for breach of contract actions relating to the local hookup and unanswered call situations. They request class certification, accounting, damages and fees.

Between the 1982 filing of the original Kellerman action and this date plaintiffs throughout the country have presented claims in federal and state courts against MCI and other companies making related state charges as well as charges under the Wire or Radio Communications Act, commonly called the Federal Communications Act, 47 U.S.C.A. § 151 *et seq.* (hereinafter FCA).[1] There have been dispositions and appeals in some of these cases and

---

[1] *Control Electronics, Inc., et al. v. S. Pac. Communications Co., et al.* No. 83-1010 (E.D. Mich. 1984); *Certified Collateral Corp. v. MCI*, 84-C-388 (N.D. Ill. 1984); *McIntosh Embossing Inc. v. MCI*, 4-84 Civil 271 (D. Minn. 1984); *Lee v. MCI*, C-84-1471 (N.D. Cal. 1984); *Euromarket Designs, Inc. v. MCI*, 84-880-C (D. Mass. 1984); *Retail Recruiters of N.Y. v. MCI*, 83-C-8048 (S.D.N.Y. 1984); *Lazar v. MCI*, C-521353 (Sup. Ct. Cal., San Diego Co. 1984); *Schuster, et al. v. GTE Sprint Comm. Corp.*, C-83-5374 (N.D. Cal. 1983); *Lee v. W. Union Telegraph*, C-84-1472 (N.D. Cal. 1984); *Kaplan v. ITT*, 83-Civ-4843 (E.D.N.Y. 1984); *Hochman v. GTE, et al.*, L-66194-83 (Sup. Ct. N.J., Somerset Co. 1983), removed 83-4555 (D. N.J. 1984).

many have been transferred to the Northern District of Michigan pursuant to the August 15, 1984, Order of the Judicial Panel on Multi-District Litigation. (Docket #598.) Additionally, a complaint was filed before the FCC in Washington, D.C., alleging MCI's violations of the FCC's tariff-filing requirements. The FCC held that although the charging practices of the companies need not be delineated in tariffs filed with the Commission, the Complaint raised "an area of concern, the method by which the carriers should notify customers of the possibility of erroneous charges for short calls and of their refund policies therefor." The Commission anticipated no need for further responsive pleadings unless they found notification procedures to be unsatisfactory, determining that they had the expertise to review the question.

It is with this background that the Consolidated Complaint and the Hesse Complaint are before this Court on MCI's motions to dismiss or stay.

PREEMPTION

MCI first argues that the comprehensive plan of federal communications regulation showed Congressional intent to preempt the field, precluding the state claims alleged by Plaintiffs and mandating dismissal with prejudice. The doctrine of preemption requires abrogation of state law to the "extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal regulatory scheme. *Cable Vision, Inc. v. KUTV, Inc.*, 211 F. Supp. 47, 56 (D. Idaho 1962), vacated on other grounds, 335 F.2d 348 (9th C. 1964), *cert. denied*, 379 U.S. 989 (1965). State cases that conflict with, adversely effect, or are repugnant to the regulatory plan cannot survive. *Benanti v. U.S.*, 355 U.S. 96, 104-06 (1957); *Computer & Communications, etc. v. FCC*, 693 F.2d 198, 216 (D.C. 1982), *cert. denied*, 103 S. Ct. 2109 (1983). However, courts have allowed the actions to proceed as federal common law claims, not as pendent state claims, when the federal interest is held to be greater than that of the

state. *Ivy Broadcasting Co. v. AT&T*, 391 F.2d 486, 490 (2d C. 1968), and *O'Brien v. Western Union Telegraph Co.*, 113 F.2d 539, 541 (1st C. 1940). Additionally, claims can proceed that harmonize with, are additional to or do not irreconcilably conflict with the statutory purposes. *Nader v. Allegheny Airlines*, 426 U.S. 290, 299-303 (1976); *MCI Communications, Inc. v. AT&T*, 462 F. Supp. 1072, 1095 (N.D. Ill. 1978); *aff'd*, 594 F.2d 594 (7th C. 1978), *cert. denied*, 440 U.S. 971 (1979); and *Ashley v. Southwestern Bell Telephone Co.*, 410 F. Supp. 1389, 1393 (W.D. Tx. 1976).

To decide whether these cases or the remedies that they seek conflict with the purposes or the operation of the FCA the court must consider the purposes of the ACT and the Illinois Statutes, the language of the FCA and its interpretation, and the possible effect of the state court decision on the federal regulatory scheme.

The Federal Court for Northern District of Illinois found no federal question in these cases. Preemption, therefore, is not a viable argument, and had MCI disagreed, it should have appealed the remand. However, this Court will address the substantive issues raised by MCI.

The goal of the FCA is to maintain rapid, efficient and reasonably-priced communications systems. 47 U.S.C.A. § 151 *et seq.*; *Ivy Broadcasting supra*, 391 F.2d at 490. To effect these purposes the FCC has been given the power to determine the justness and reasonableness of "charge(s), practice(s), classification(s), and regulation(s)" for and in connection with communication services. 47 U.S.C.A. § 201(b). By contrast, the purposes of the Illinois Consumer and Fraud Deceptive Business Practice Act and the Uniform Deceptive Trade Practices Act are to protect Illinois consumers and businessmen against fraud and deceptive acts in the conduct of trade and to give remedies to the injured. Ill. Rev. Stats. ch. 121½ § 262 *et seq.* and 311 *et seq.*; *American Buyers Club of Mt. Vernon, Ill., Inc. v. Honecker*, 46 Ill. App. 3d 252, 255 (5th D. 1977). On a general level, the State's interest

in protecting its citizens from deceptive activities and the federal interest in efficient communications coexist rather than conflict. The following cases stand for the proposition that common law and other remedies can coexist with regulatory schemes; *Nader, supra*; *Gowdey v. Commonwealth Edison Co.*, 37 Ill. App. 3d 140, 148-149 (1st D. 1976); *MCI v. AT&T*, 708 F.2d 1081, 1102-103 (7th C.), *cert. denied*, 104 S. Ct. 234 (1983); *Ashley, supra*,; and *Curran v. MacKay Radio and Telephone Co.*, 123 F. Supp. 83, 91 (S.D.N.Y. 1954). State actions in contract and tort are not preempted. *In re Midwest Relay Co.*, 69 F.C.C. 2d 409, 417 n.25 (1978).

MCI next looks at the language of the FCA and concludes that the practices alleged by Plaintiffs fall under the types of practices regulated by the FCC via 47 U.S.C.A. § 201(b). This argument at first glance seems bolstered by the federal courts' dismissals with prejudice in *Schuster & Lee v. W. Union*, the FCC Order, and the recent order by the District Court of Michigan in the *Lazar* case, taking jurisdiction over state claims. This Court does not doubt the FCC's expertise or the ability for federal courts to have concurrent jurisdiction; however their jurisdiction over these issues is not exclusive. The clear language of the FCA reads

> § 414. Exclusiveness of chapter
>
> Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

47 U.S.C.A. § 414. Congress did not draft this section just to have it ignored or rendered ineffective. *Pennsylvania RR Co. v. Puritan Coal Co.*, 237 U.S. 121 (1915). Indeed, the Supreme Court in *Nader, supra*, 426 U.S. 290, when faced with the comprehensive regulations of airlines, held that a similar provision in the Federal Aviation Act meant that the Act's remedies supplemented common law claims for deceptive advertising. The Court refused to ignore the import of that section. The Court even held that the rem-

edies granted in the anti-deceptive practices chapter of the Aviation Act were additional to common law remedies but did not preempt them. *Id.*, 426 U.S. at 301. MCI is in effect trying to argue that § 201(b) of the Federal Communications Act is a deceptive practices sections with remedies for violations; however, even if that were true, the language in *Nader* making the remedies supplemental or additional to those at common law would control.

MCI also argues that Plaintiffs are really only complaining about rates, a subject of FCC regulation. However, Plaintiffs do not allege that the rates are unjust or unreasonable, and such a construction twists the purport of their complaints. They are alleging that the advertising for charges and services was deceptive. The State has a great interest in protecting its citizens, and the happy coincidence that an alleged deceptive practice was perpetrated by a common carrier regulated by the FCA cannot, without more, render this State's remedial acts null and void. *See Ashley, supra*, 410 Supp. at 1392. Taking the State's great interest together with the plain language of § 414 of the FCA, the Court sees that both federal and state legislatures favor remedies additional to those granted by the Act. Language in statutes should be given their plain meaning, and this Court will not limit consumer remedies when the Legislatures have not done so.

MCI, following the theory propounded in *Texas and Pacific RR. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) and reiterated in *Ivy*, urge that differing liability in different states would create different rates in each state, thereby conflicting with the federal goal of rare uniformity. This argument has been used to create an exception to the additional remedies language of § 414. Much case law has been created in the area of telegram and telegraph delivery; the courts have held that subjecting the companies to tort or contractual liability for defamation or for non-delivery of messages would require a slowing of the delivery services, conflicting with the statutory purposes of efficient and speedy service. *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251

U.S. 27, 30 (1919); *O'Brien, supra*, 113 F.2d at 541-42; and *Vaigneur v. Western Union Telegraph Co.*, 34 F. Supp. 92, 93 (E.D. Tenn. 1940). Such problems are not at issue here, and no facts confirming any allegation of impact on rates have been produced. Additionally, this rationale has been put into question by the *Nader* Court, which stated that:

> any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be merely incidental. Under the circumstances, the common-law action and the statute are not "absolutely inconsistent" and may coexist, as contemplated by (the Act). . . .

Nader, supra, 426 U.S. at 300. This Court agrees with the *Nader* rationale. An exception to the statutory language of § 414 is not appropriate here since any impact of this decision on rates would be incidental.

Finally, MCI cites *Ivy, supra*, for the proposition that federal common law, not state law, applies. In *Ivy*, the federal district court dismissed claims against AT&T for breach of contract and negligence in installing, testing and operating telephone lines used by the plaintiff to transmit Syracuse football games. Plaintiffs brought an appeal from their dismissal, and the Second Circuit reversed, stating that although the actions did not fall under the FCC's jurisdiction, federal interest in the case was so great that the issues should be decided by federal common law, not by state law. 391 F.2d at 491. The Court accepted the theory of differing liabilities creating non-uniformity of rates. This case is distinguishable from the one before the Court today. First, Judge Parsons remanded the cases back to this Court, in disagreement with the *Ivy* finding that federal issues were present. Second, this Court is confronted with a superceding state interest in the welfare of consumers and does not agree that an unspecified impact on uniformity of rates gives the federal courts more interest than that of Illinois in protecting consumers. The federal interest is no more than tangential. The federal

statute does not address deceptive practices nor purport to regulate them. The state acts do exactly that, with the express remedial intent of giving consumers a remedy for deceptive practices. The federal interest in these particular cases must defer to the greater interest of the State of Illinois. Finally, the *Ivy* court did not have the benefit of the *Nader* language relating to minimal decisional impact on federal uniformity. These factors distinguish *Ivy* from the present situation.

Since the purposes of the federal and state acts do not conflict, since the plain meaning of § 414 of the FCA allows state actions to proceed, since the impact on the federal regulatory scheme will be negligible and since the State's interest by far outweighs that of the federal government in these cases, this Court holds that these actions are not preempted by federal law.

PRIMARY JURISDICTION

MCI next argues that the FCC has primary jurisdiction over this action. The doctrine of primary jurisdiction allocates issues between the regulatory agency and the courts. *Nader, supra*, 426 U.S. at 303; *Mississippi Power & Light Co. v. United Gas Pipe Line*, 532 F.2d 412, 417 (5th C. 1976), *cert. denied*, 429 U.S. 1094 (1977); and *Valiquet v. First Federal Savings and Loan*, 87 Ill. App. 3d 195, 198 (1st D. 1979). The Courts will defer to the agency's jurisdiction for an initial determination when it will 1) materially aid the court's resolution of the issues, 2) when complex and technical issues of fact are raised that are within the special competence and expertise of the administrative agency, and 3) where uniformity of rulings is essential to comply with the goals of the federal statute. *Valiquet, supra*, 87 Ill. App. 3d at 198-99, and *Village of Wilsonville v. SCA Services*, 77 Ill. App. 3d 618, 626 (4th D. 1979), *aff'd*, 86 Ill. 2d 1 (1981), *citing* 2 Am. Jur. 2d *Administrative Law* § 788 at 689 (1962). However, issues that do not interfere with the regulatory goals or that do not call for adjudication outside of the court's conventional competence need not be deferred to the agency.

Nader, *supra*, 426 U.S. at 304-05; *Gowd[illegible]*, *supra*, 37 Ill. App. 3d at 148-49. Issues that seem to invite agency resolution but which are in truth peripheral to the main litigational questions need not be the cause of deference. *Mississippi Power*, *supra*, 532 F.2d at 419. The question, then, before this Court is upon which side of the line the cases before us fall.

Although MCI has argued that rates and practices are at issue here and are within the exclusive competence of the FCC, in reality the Complaints raise questions of deceptive advertising, fraud and breach of contract. Therefore, agency determination of the reasonableness of the rates will not materially aid the Court in determining whether deceptive practices took place.

Additionally, no special knowledge other than that already held by this Court is required to determine these statutory and common law claims. This case does not involve a conflict between federal and state rates (*see Computer*, *supra*, 693 F.2d 198), allocation of resources in a national emergency (*see Chicago & Eastern Ill. RR Co. v. Martin Bros. Container & Timber Prods. Corp.*, 87 Ill. App. 2d 327 (1st D. 1980)) or how and by whom certain hookups of consumer devices are to be regulated. (*See North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th C.), *cert. denied*, 434 U.S. 874 (1977); *Continental Telephone Corp. v. FCC*, 537 F.2d 788 (7th C. 1976).) Such cases do indeed involve resolution of technical or policy matters and are properly before the FCC. However, the contract and fraud issues before this Court are well within its traditional competence; deferral is unwarranted on this basis.

As previously discussed, the goal of uniformity of rates should not be significantly affected by this Court's determination of liability.

Finally, this Court is aware that consideration of efficiency and speed of resolution are necessary to a determination of whether this Court should retain jurisdiction. The delay inherent in waiting for a determination by the

Agency that the disclosure practices are "unsatisfactory" is unnecessary. Plaintiffs have already been removed to federal court and remanded, with all the delays attendant thereupon. Further delay is unwarranted.

Since none of the basis for dismissal under the doctrine of primary jurisdiction are present, the Court declines to dismiss these Complaints on the basis of the doctrine.

§ 2-619(a)(3) DISMISSAL

MCI next claims that since virtually the same actions are pending between the same parties in federal court, this Court should dismiss the action pursuant to § 2-619 (a)(3) of the Illinois Code of Civil Procedure, which reads:

> (a) Defendant may, within the time for pleading, file a motion for dismissal . . . or for other appropriate relief upon any of the following grounds.
>
> (3) That there is another action pending between the same parties for the same cause.

Ill. Rev. Stats. ch. 110 § 2-619 (a)(3). MCI cites *Skolnick v. Martin*, 32 Ill. 2d 55, *cert. denied*, 381 U.S. 926 (1965) and its progeny for the proposition that the "same cause" and the "same parties" requirements are met when relief is based upon substantially the same set of facts. *Id.*, 32 Ill. 2d at 57; *Cummings v. Iron Hustler Corp.*, 118 Ill. App. 3d 327, 332 (3d D. 1983); *Catalano v. Aetna Casualty & Surety Co.*, 105 Ill. App. 3d 195, 198 (2d D. 1982). However, recent Illinois decisions recognize that dismissal is discretionary, *A.E. Staley Mfg. Co. v. Swift & Co.*, 84 Ill. 2d 245, 252-53 (1980); *People ex rel. Dept. of Public Aid v. Santos*, 92 Ill. 2d 120, 127 (1982); and *People ex rel. Fahner v. Climatemp, Inc.*, 101 Ill. App. 3d 1077, 1084 (1st D. 1981), and a court can proceed with a sister or federal court simultaneously if the action has a legitimate and substantial relation to Illinois and if duplication is at a minimum. *Staley, supra*, 84 Ill. 2d at 252-53.

The federal cases and these Complaints do not allege the same cause, as recognized by our federal court in its remand order. The elements of proof for FCA rate violations are not the same as those for deceptive trade and breach of contract actions. Also, not all federal cases allege breach of contract; therefore, the relief requested in the cases before us is different than that requested by the other complaints. These facts distinguish the cases before us from the "same cause" cases cited by MCI in its brief.

MCI next claims that the same parties are involved in all suits since the federal and state class actions encompass all alleged plaintiffs. See *Anagnost v. Hammond Corp.*, 73 Ill. App. 3d 667 (1st D. 1979). However, implied in the language of § 2-619(a)(3) is the requirement that the movant must show similarities of *both* parties and causes. Since the causes are not the same the test has not been met. Additionally, the plaintiffs in *Anagnost* were requesting the same relief that was requesting the same relief that was requested in pending cases, which cases actually enveloped the later-filed Illinois action. No such situation is before this Court.

The Court does not believe that much duplication will exist and notes that any duplication required will not be unduly burdensome. The federal cases allege unfair and unjust rates, which have elements of proof different than those necessary for the contract and fraud claims. Only one federal case, *Certified Collateral*, 84-C-388, has Illinois statutory claims under the Consumer Fraud and under the Deceptive Practices Acts. However, these allegations may be dismissed by Judge Taylor as she dismissed *Control Electronics*' state claims. Therefore, although duplication of some documents *may* be necessary, duplication of theories and litigation strategy is questionable at best.

Finally, although recognizing that the federal court kept the *Lazar* complaint, this Court sees the action as inconsistent with that Court's previous ruling dismissing the pendent state claims in *Control Electronics*. This Court further notes that state claims have been dismissed with

prejudice in the *Schuster* and *Lee* cases and have been dismissed without prejudice in *Retail Recruiters* as well as in *Control Electronics*. The Court sees no need to subject Plaintiffs to a possible dismissal when Illinois has clear jurisdiction of these cases.

Because the § 2-619(a)(3) tests have not been met, the Court will not use that section to dismiss these Complaints.

§ 2-619(a)(3) STAY

Lastly, MCI urges a stay of this action. The stay of these cases is discretionary. *Landis v. North American Co.*, 299 U.S. 248, 256 (1936). To grant a stay the Court must consider the interest of comity, the possibility of duplication, intent to harass, and the *res judicata* effect of this decision or a federal decision. *Staley*, *supra*, 84 Ill. 2d at 254. The United States Supreme Court in *Landis*, *supra*, also cautioned that:

> . . . the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants . . . True, the suppliant for a stay must make out a clear case of hardship of inequity in being required to go foreward, if there is even a fair possibility that the stay for which he prays will work damages to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.

Landis, 299 U.S. at 254-55.

As has been previously discussed, duplication is a minor problem. As has also been discussed, resolution of federal claims for unjust rates will not aid this Court in determining whether contracts have been breached and fraud has been committed. This is a situation where two tribunals are approaching a problem from entirely different

points of view and where a stay is not appropriate. *See People ex rel. Scott v. U.S. Steel Corp.*, 40 Ill. App. 3d 607, 612-14 (1st D. 1976); and *Metropolitan Sanitary District v. U.S. Steel Corp.*, 30 Ill. App. 3d 360, 370 (1st D. 1975), *cert denied*, 424 U.S. 976.

No *res judicata* problems are present. This Court has determined that if the FCC has the power to review the notification procedures of the companies, such jurisdiction is concurrent to our own. FCC review of whether notice is "satisfactory" and federal determination that rates are unjust are hardly the same as a determination that fraud or breach of contract has been committed. The decisions may supplement but will not supplant each other. Therefore, decisions made by this Court will not have *res judicata* effect in the federal system or vice versa. See *Citibank v. Graphics Scanning Corp.*, 618 F.2d 222 (2d C. 1980).

Further, this Court does not see any evidence, nor has any been alleged, of Plaintiffs' harassment of MCI; the Illinois cases were some of the first filed in the nation. If anything, we see an attempt by MCI to force plaintiff out of its chosen forum.

"Plaintiff is still the master of his own complaint as to what law he will rely upon." *Ashley, supra*, 410 F. Supp. at 1392. Where plaintiff has a choice of relying on either state or federal law and chooses a state forum, electing not to sue on his federal rights, "the court cannot force such suit by rewriting his complaint" or allowing Defendant to do so. *Id.*, 410 F. Supp. at 1392.

Finally, these Plaintiffs have been in court since 1982 without a decision on the merits. They have been removed and then remanded, waiting out all the attendant delays such actions entail. This Court has an interest in seeing that parties who come before it have their matters speedily and conclusively adjudicated, and sees no further need for a delay that will not resolve their issues. A stay is not appropriate in this instance.

CONCLUSION

Plaintiff's actions are not prempted by federal law, nor does the FCC have primary jurisdiction of these cases. The Illinois and Supreme Court tests for stay or dismissal pursuant to § 2-619(a)(3) have not been met. Finally, this Court believes that MCI's efforts to force Plaintiffs out of this forum when our federal court has already declared these cases non-federal is an attempt to send these suits into oblivion. Plaintiffs should not be forced to forego their complaints or forced into the forum in which MCI prefers to litigate. Illinois evinces a strong interest in giving consumers a remedy for practices such as those alleged in the Complaints (if proven true) and this Court refuses to render this interest academic or ineffective.

ORDER

Based upon the foregoing;

IT IS HEREBY ORDERED that all defendant's motions for dismissal are herewith denied;

Further, Defendant's motion for stay is herewith denied;

Further, the Defendant is herewith granted 28 days within which to answer all of the complaints consolidated herein.

ENTER:

_____

Judge

No. 86-454

Supreme Court, U.S.
FILED
OCT 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

S. KELLERMAN, d/b/a Authorized Sales & Service; LOUIS T. DAVIS & ASSOCIATES, INC.; and BERNARD TUROVITZ,
Respondents.

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

PHYLLIS HESSE,
Respondent.

BRIEF OF RESPONDENTS KELLERMAN/DAVIS/TUROVITZ IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

ALVIN W. BLOCK *
RUSSELL C. GREEN
EDWARD A. COHEN
BLOCK, LEVY & ASSOCIATES
33 North LaSalle Street
Chicago, Illinois 60602
(312) 346-5656

Attorneys for Respondents Kellerman/Davis/Turovitz

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Whether a wholly interlocutory order involving no conflict and impinging on no federal statute is reviewable by this Court.
2. Whether state law tort remedies for deceptive advertising are preempted by the Federal Communications Act.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
STATUTES INVOLVED	1
STATEMENT OF FACTS	3
REASONS FOR DENYING WRIT:	
I. THE COURT'S JURISDICTION IS NOT PROPERLY INVOKED UNDER 28 U.S.C. SEC. 1257(3) BECAUSE THERE IS NO FINAL JUDGMENT OR DECREE	5
II. THESE ACTIONS ARISE EXCLUSIVELY UNDER STATE LAW	6
III. THE ILLINOIS SUPREME COURT'S DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT	7
IV. THE ILLINOIS SUPREME COURT'S DECISION BELOW DOES NOT CREATE A CONFLICT REQUIRING RESOLUTION BY THIS COURT	8
V. THE F.C.C. DOES NOT REGULATE ADVERTISING BY SPECIALIZED COMMON CARRIERS	9
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	PAGE
Bill Correctors, Ltd. v. MCI Communications Corp., Dkt. No. E-84-11 (FCC 1984)	7
Fifth Report and Order, 98 F.C.C. 2d 1191 (1984)	11
First Report and Order, 85 F.C.C. 2d 1 (1980) ..	10
Flynt v. Ohio, 451 U.S. 619, 68 L. Ed 2d 489, 101 S. Ct. 1958 (1981)	5
Fourth Further Notice of Proposed Rulemaking, 49 Fed. Reg. 11,856 (1984)	11
Fourth Report and Order, 95 F.C.C. 2d 554 (1983)	10, 11
Further Notice of Proposed Rulemaking, 84 F.C.C. 2d 445 (1981)	10
Further Notice of Proposed Rulemaking, 47 Fed. Reg. 17,308 (1982)	10
GTE and Telenet Merger, 84 F.C.C. 2d 18 (1979) ..	10
Head v. New Mexico Board of Examiners, 374 U.S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (1963)	7
Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2nd Cir. 1968)	8, 9
Nader v. Allegheny Airlines, 426 U.S. 290, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976)	8
Nordlicht v. New York Telephone Co., No. 86-7218 (2nd Cir. Aug. 25, 1986)	8

Notice of Inquiry and Proposed Rulemaking, 77 F.C.C. 2d 308 (1979) 10

People ex rel. Hartigan v. Hunter Publishing Corp., 119 Ill. App. 3d 1049 (1st Dist. 1983) 6

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 92 L. Ed. 1212, 68 S. Ct. 972 (1947) ... 6

Second Computer Inquiry, 77 F.C.C. 2d 384 (1979), *aff'd on recon.*, 84 F.C.C. 2d 50 (1980), 88 F.C.C. 2d 512 (1981), *aff'd sub nom. CCIA v. F.C.C.*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom. Louisiana P.S.C. v. United States*, 461 U.S. 938 (1983) 10

Second Report and Order, 91 F.C.C. 2d 59 (1982), *recon. denied*, 93 F.C.C. 2d 54 (1983) 10

Sixth Report and Order, 57 Rad. Rep. 2d (P&F) 1391 (1985) 11

Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983) 10, 11

Third Report and Order, 48 Fed. Reg. 46,791 (1983) 11

Statutes

Ill. Rev. Stat. Ch. 121½, Sec. 262 1

Ill. Rev. Stat. Ch. 121½, Sec. 270a 2

Ill. Rev. Stat. Ch. 121½, Sec. 312 2

47 C.F.R. Sec. 64.702 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

S. KELLERMAN, d/b/a Authorized Sales & Service; LOUIS T. DAVIS & ASSOCIATES, INC.; and BERNARD TUROVITZ,
Respondents.

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

PHYLLIS HESSE,
Respondent.

BRIEF OF RESPONDENTS KELLERMAN/DAVIS/TUROVITZ IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

STATUTES INVOLVED

Ch. 121½, Sec. 262, Ill. Rev. Stat.

262. Unlawful practices—Construction with Federal Trade Commission Act

Sec. 2. Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense,

false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment or any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. * * * *

Ch. 121½, Sec. 270a, Ill. Rev. Stat.

270a. Action for damages

Sec. 10a. (a) Any person who suffers damage as a result of a violation of Sections 2 through 20 of this Act[1] committed by any other person may bring an action against such person. The court, in its discretion may award actual damages or any other relief which the court deems proper.

* * * *

[1] Paragraphs 262 to 262-o of this chapter.

Ch. 121½, Sec. 312, Ill. Rev. Stat.

312. Acts constituting deceptive trade practice

Sec. 2. A person engages in a deceptive trade practice when in the course of his business, vocation or occupation, he:

* * * *

(5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;

* * * *

(7) represents that goods or services are a particular standard, quality or grade or that goods are a particular style or model, if they are of another;

(8) disparages the goods, services or business of another by false or misleading representation or act;

(9) advertises goods or services with intent not to sell them as advertised;

(10) advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) makes false or misleading statements of fact concerning the reasons for, existence of or amounts of price reductions;

(12) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

In order to prevail in an action under this Act, a plaintiff need not prove competition between the parties or actual confusion or misunderstanding.

This Section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this State.

STATEMENT OF FACTS

This action was commenced by the filing of a class action complaint by Isidore Kellerman in the Circuit Court of Cook County, Illinois, in December, 1982. That complaint alleged that MCI published advertising in which it made comparisons between its long-distance rates and those of Bell/AT&T and represented savings on its services. In making such comparisons MCI did not make any disclosure that there is an additional cost attendant upon the use of MCI services because a user pays a local access charge to reach MCI relay equipment. That additional expense dramatically effects the cost comparisons on many

calls. Count I alleged that this omission violated the Illinios consumer fraud statute and sought damages for an Illinois class. Count II alleged that the omission constituted common law fraud or misrepresentation and sought damages on behalf of a national class. MCI removed the case to the United States District Court. The District Court remanded the case to the state court.

In November 1983, Louis T. Davis & Associates, Inc.* filed an intervenor class action complaint. That complaint made the same allegations concerning advertising and comparisons as the original Kellerman complaint. In addition, that complaint alleged that MCI made favorable cost comparisons in its advertising without disclosing another additional expense, that in certain situations an MCI customer pays for uncompleted calls. This omission was alleged to also violate statutory provisions and common law and damages were sought on behalf of an Illinois class and a national class.

In November, 1983, a class action suit was filed on behalf of Bernard Turovitz. The Turovitz complaint mirrored the Davis intervenor complaint seeking damages for Illinois and national classes.

None of the above three complaints alleged any violation of federal law. None of them in any way alleged that MCI's rates or charges were unreasonable. None of the three complaints alleged that MCI failed to provide nondiscriminatory service.

An order was entered consolidating Turovitz with Kellerman/Davis. In July, 1984, the Plaintiffs in the consoli-

* This is an Illinois corporation with no parent corporation, no subsidiary corporations and no affiliates.

dated Kellerman/Davis/Turovitz case filed an Amended Class Action Complaint.

MCI filed a motion to stay or to dismiss the amended complaint. That motion asserted preemption as a basis of dismissal. The motion asserted primary jurisdiction of the F.C.C. as a basis for a stay and asserted that the pendency of certain federal law suits alleging violations of federal law constituted a basis for a stay. The trial court entered its memorandum opinion denying the motion to dismiss and the motion to stay. MCI filed a Notice of Interlocutory Appeal only from the denial of the motion for a stay.

REASONS FOR DENYING WRIT

I.

THE COURT'S JURISDICTION IS NOT PROPERLY INVOKED UNDER 28 U.S.C. SEC. 1257(3) BECAUSE THERE IS NO FINAL JUDGMENT OR DECREE.

The Illinois Supreme Court order is wholly interlocutory in nature. The trial court denied a motion to stay proceedings. That order gave rise to an appeal as a matter of right to the Appellate Court of Illinois. The Appellate Court affirmed. MCI filed a petition for leave to appeal to the Illinois Supreme Court, and that court affirmed. The case is still pending in the Circuit Court of Cook County, Illinois, and pretrial discovery procedures and other pretrial matters continue on. Classes have been certified. The trial court has set a discovery cutoff and a trial and final judgment can be expected in mid-1987. The decision of the Illinois Supreme Court is not a final judgment or decree within the meaning of 28 U.S.C. Sec. 1257. *Flynt v. Ohio,* 451 U.S. 619, 68 L. Ed. 2d 489, 101 S.

Ct. 1958 (1981); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 92 L. Ed. 1212, 68 S. Ct. 972 (1947).

II.

THESE ACTIONS ARISE EXCLUSIVELY UNDER STATE LAW.

The deceptive content of media advertising is a proper subject of a cause of action under the Illinois consumer fraud statute and the Illinois deceptive trade practices statute. *People ex rel. Hartigan v. Hunter Publishing Corp.*, 119 Ill. App. 3d 1049 (1st Dist. 1983). The gist of the Kellerman/Davis/Turovitz Class Action Complaint is a prayer for damages for statutory and common law torts for failing to disclose in public advertising that there were costs which made rate comparisons unfavorable and inaccurate. This lawsuit would not have come about if MCI had included in its advertisements of cost comparisons the following disclosure:

> in some situations an MCI customer incurs charges from its local telephone company for access to MCI lines or charges for some attempted calls which are not completed. These potential charges are not included in the comparisons of MCI rates and Bell rates shown in this table.

Petitioner incorrectly portrays this as a case which involves the "charges and practices" of a specialized common carrier subject to regulation under the Federal Communications Act. Plaintiffs have never questioned the propriety of or commercial reasonableness of MCI's rates.[1]

[1] AT&T provides that *chargeable time* shall commence when connection is established. We do not suggest that MCI cannot use a different criterion or compute its charge any way it wants, but

(Footnote continued on following page)

Petitioner refers to the claims herein as claims for "refunds". The local access charges are neither imposed by nor collected by MCI. The damages sought by Plaintiffs are not "refunds".

III.

THE ILLINOIS SUPREME COURT'S DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

This Court considered the relationship between state regulation of advertising and federal regulation of broadcast facilities under the Communications Act in *Head v. New Mexico Board of Examiners*, 374 U.S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (1963), and held that F.C.C. jurisdiction over radio broadcasting did not preempt a state statute regulating the content of advertising for eyeglasses. Examining the standard applied there, a similar result is required here. There are no F.C.C. regulations even remotely touching on the subject matter of deceptive advertising. The F.C.C. itself has indicated that it sees no objection to state claims for deceptive advertising.[2]

---

[1] *continued*
when it makes comparisons in advertising showing cheaper rates it has a duty to disclose that it uses a different method which sometimes results in a charge even when no one answers, as has now been admitted by MCI in pleadings filed below.

[2] In response to an informal inquiry by your responding counsel the Chief of the Common Carrier Bureau, F.C.C., Albert Halprin stated in a letter dated January 17, 1986, that the *Bill Correctors, Ltd. v. MCI Communications Corp.* case did not preempt state regulation of advertising. In response to a request for retraction by MCI dated February 12, 1986, Mr. Halprin reiterated in a letter dated February 19, 1986, that the *Bill Correctors* case did not preclude a challenge under state law such as the claims asserted herein. These documents were a part of the record before the Illinois Supreme Court.

Nader v. Allegheny Airlines, 426 U.S. 290, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976) set the parameters for actions such as this by finding that "the standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts . . ." 48 L. Ed. 2d at 656.

IV.

THE ILLINOIS SUPREME COURT'S DECISION BELOW DOES NOT CREATE A CONFLICT REQUIRING RESOLUTION BY THIS COURT.

There is no conflict between the Illinois Supreme Court's opinion and any federal court decisions. The opinion in *Nordlicht v. New York Telephone Co.*, No. 86-7218 (2nd Cir. Aug. 25, 1986) is unique in that it directly challenged the manner in which a carrier charged for international calls. The Court affirmed summary judgment for the company on the ground that international calls had been billed in accordance with the "Interconnection and Service Agreement Between the American Telephone & Telegraph Company and the Trans-Canada Telephone System" and tariffs on file with the F.C.C., and affirmed dismissal because of the failure of the plaintiff to present evidence that prices were quoted for intra-Canadian calls in Canadian Dollars. The claims were for improper and fraudulent billing practices, not for deceptive advertising.

The *Nordlicht* court specifically rejected the Communications Act as a basis of federal jurisdiction, as the same court did in *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F. 2d 486, 489 (2nd Cir. 1968), stating:

> clearly the remedy which plaintiff seeks is not one granted by an act of Congress . . . Nor do we think that such a remedy should be "inferred" from the Act; there is no reason to believe that Congress, in

the Communications Act, intended to declare the existence of the fundamental right to recover for tort or breach of contract.

Petitioner cites several federal district court cases as being in "conflict" with the Illinois Supreme Court. Most, if not all, of those cases were consolidated as multi-district litigation in the Eastern District of Michigan. The consolidated complaint pending there affirmatively alleges federal jurisdiction under and asserts claims arising under the Federal Communications Act and the Racketeer Influenced and Corrupt Organizations Act. This case presents absolutely no such claims under federal law.

The claims in the Kellerman/Davis/Turovitz complaint here for failure to disclose in advertising that local access charges distort rate comparisons are *absolutely unique*. There is not another case anywhere which involves a claim under state law for deceptive advertising based upon those facts, and no relief can be granted anywhere else based upon those issues.

V.

THE F.C.C. DOES NOT REGULATE ADVERTISING BY SPECIALIZED COMMON CARRIERS.

The essential elements of regulation under Title II of the Communications Act entail control of price, establishment through tariffs of terms and conditions of service, prohibitions on discrimination, control of investments and an obligation to serve all. It can be viewed as a regulatory scheme directed at problems associated with monopoly control or market power. No provision of the Act directly or indirectly deals with deceptive advertising. The regulations of the Federal Communications Commission, 47 C.F.R. Parts 20 to 69, simply do not contemplate that the

F.C.C. shall supervise the content of common carrier advertising to determine whether or not it is deceptive.[3]

The *Second Computer Inquiry* was the first major step taken by the Commission to narrow the scope of activities subject to regulation.[4] In *Second Computer Inquiry* the Commission prohibited regulated carriers from engaging in the sale or promotion of enhanced services or customer premises equipment on behalf of their unregulated separate subsidiaries. Thus, the Commission dealt only with "advertising" as it was necessary to protect the integrity of structural separation. The Commission did not address deceptive advertising. A similar result prohibiting merged companies from manipulating shared advertising expenses was reached in *GTE and Telenet Merger*, 84 F.C.C. 2d 18 (1979). That case also had to do with monopoly power and structural separation. This case does not involve those issues.

The consistent policy in recent years has been to deregulate specialized common carriers.[5] In its *Fourth Report*

---

[3] There is mention of "promotion" or "disclosure" in a recent amendment, Section 64.702. That provision deals solely with the implementation of a policy to require and to secure the integrity of structural separation between related corporations providing both regulated and unregulated telecommunications services. It does not deal with deceptive advertising.

[4] *Second Computer Inquiry*, 77 F.C.C. 2d 384 (1979), *aff'd on recon.*, 84 F.C.C. 2d 50 (1980), 88 F.C.C. 2d 512 (1981), *aff'd sub nom. CCIA v. F.C.C.*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom. Louisiana P.S.C. v. United States*, 461 U.S. 938 (1983).

[5] *See, Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C. 2d 308 (1979), *First Report and Order*, 85 F.C.C. 2d 1 (1980); *Further Notice of Proposed Rulemaking*, 84 F.C.C. 2d 445 (1981); *Second Report and Order*, 91 F.C.C. 2d 59 (1982), *recon. denied*, 93 F.C.C. 2d 54 (1983); *Further Notice of Proposed Rulemaking*, 47 Fed. Reg. 17,308 (1982); *Third Further Notice of Proposed Rule-*

(Footnote continued on following page)

the Commission articulated the guiding principle that "the Commission has the duty to determine that its rules promote the public interest when applied to particular carriers or applicants, and *to refrain from imposing and to remove unnecessary regulatory burdens on carriers.*" 95 F.C.C. 2d at 580. (emphasis added) MCI is asking this Court to increase the regulatory burden on carriers and to expand the regulatory responsibilities of the F.C.C. into new areas. That request is not appropriate.

CONCLUSION

The wholly interlocutory order of the Illinois Supreme Court is not subject to review under 28 U.S.C. Sec. 1257(3). The Communications Act does not preempt the purely state-law causes of action asserted herein. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ALVIN W. BLOCK *
RUSSELL C. GREEN
EDWARD A. COHEN
BLOCK, LEVY & ASSOCIATES
Attorneys for Respondents
Kellerman/Davis/Turovitz

* Counsel of Record

---

[5] *continued*
making, 48 Fed. Reg. 28,292 (1983); *Third Report and Order*, 48 Fed. Reg. 46,791 (1983); *Fourth Report and Order*, 95 F.C.C. 2d 554 (1983); *Fourth Further Notice of Proposed Rulemaking*, 49 Fed. Reg. 11,856 (1984); *Fifth Report and Order*, 98 F.C.C. 2d 1191 (1984); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities, Authorization Therefore: Sixth Report and Order*, 57 Rad. Rep. 2d (P&F) 1391 (1985).

No. 86-454

Supreme Court, U.S.
FILED
OCT 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

S. KELLERMAN, d/b/a Authorized Sales & Service; LOUIS T. DAVIS & ASSOCIATES, INC.; and BERNARD TUROVITZ,
Respondents.

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

PHYLLIS HESSE,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT PHYLLIS HESSE'S BRIEF IN OPPOSITION

HOWARD Z. GOPMAN
HOWARD Z. GOPMAN & ASSOC.
5225 Old Orchard Road
Skokie, Illinois 60077
(312) 965-8910

KEVIN M. FORDE *
KATRINA VEERHUSEN
KEVIN M. FORDE, LTD.
111 West Washington Street
Chicago, Illinois 60602
(312) 641-1441

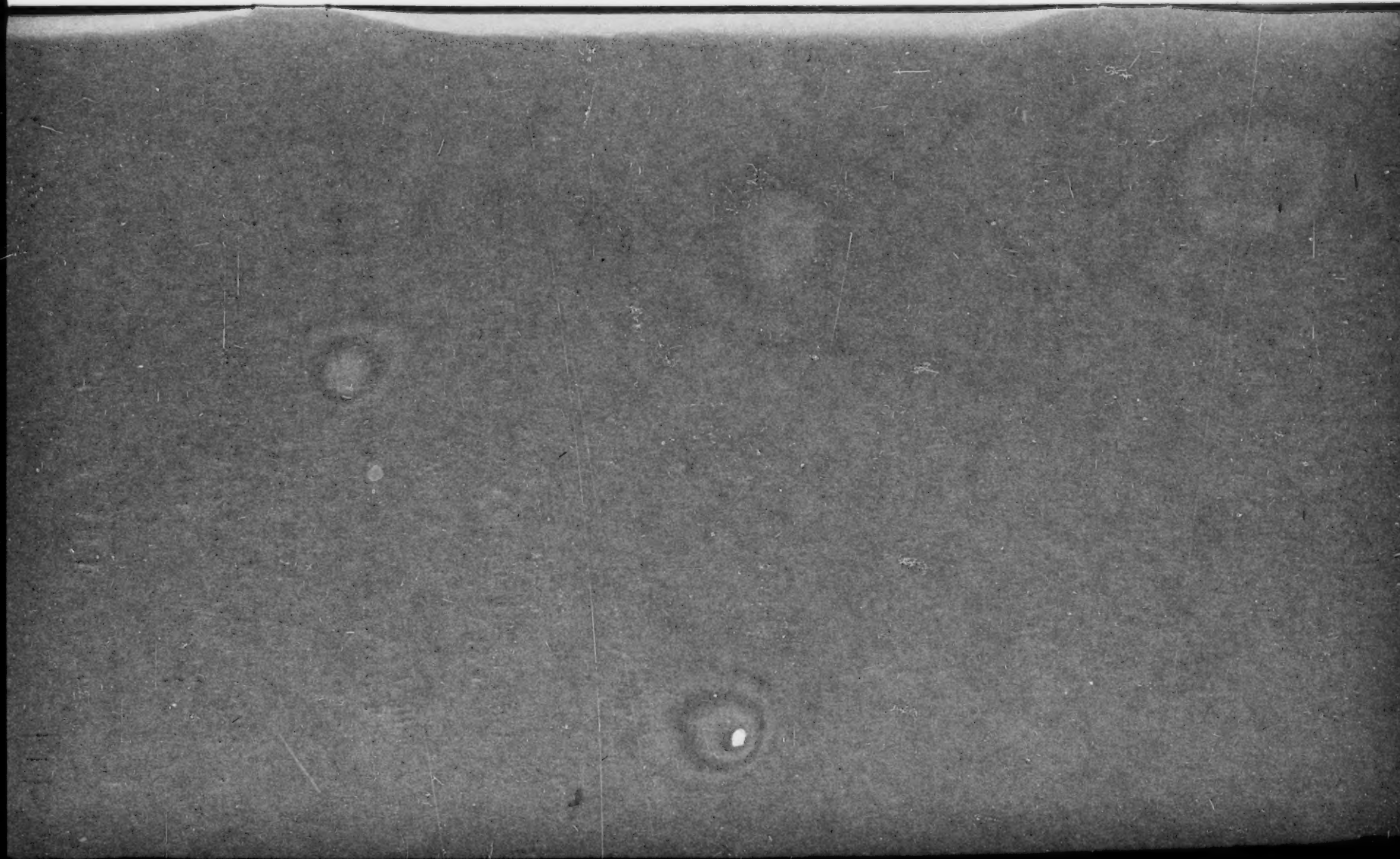
RICHARD J. PRENDERGAST
JOSEPH E. TIGHE
RICHARD J. PRENDERGAST, LTD.
111 West Washington Street
Chicago, Illinois 60602
(312) 641-0881

* Counsel of Record

Attorneys for Phyllis Hesse

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

18 pp



QUESTION PRESENTED

Whether a State Court decision refusing to dismiss claims alleging advertising and disclosure practices in violation of state common law and state statutes presents any issue which is appropriately reviewable by this Court at this early stage of the proceedings.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
ADDITIONAL STATUTE INVOLVED	2
COUNTERSTATEMENT OF FACTS	2
REASONS WHY THE WRIT SHOULD BE DENIED:	
I. NO CONFLICT EXISTS BETWEEN THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE DECISION OF THE ILLINOIS SUPREME COURT IN THIS CASE	6
II. MCI'S PREEMPTION ARGUMENT HAS ALREADY BEEN DECIDED BY THIS COURT AND DOES NOT MERIT REVIEW	9
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	PAGE
Ashley v. Southwestern Bell Telephone Co., 410 F. Supp. 1389 (W.D. Tex. 1976)	10
Bill Correctors, Ltd. v. MCI Telecommunications Corp., Docket No. E-84-11 (F.C.C. 1984)	3, 4, 10, 11
Bruss Co. v. Allnet Communication Services, Inc., 606 F.Supp. 401 (N.D. Ill. 1985)	7
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)	5
Comtronics, Inc. v. Puerto Rico Telephone Co., 553 F.2d 701 (1st Cir. 1977)	5, 10
Great Northern Railway Co. v. Merchants Elevator Co., 259 U.S. 285 (1922)	11
Ivy Broadcasting Co. v. American Telephone & Telegraph Co., 391 F.2d 486 (2d Cir. 1968)	5, 8, 9
Kaplan v. ITT-U.S. Transmission Systems, Inc., 589 F.Supp. 729 (E.D.N.Y. 1984)	7
Kellerman v. MCI Telecommunications Corp., 112 Ill.2d 428, 493 N.E.2d 1045 (1986)	4, 5, 6
MCI Communications v. American Telephone & Telegraph Co., 708 F.2d 1081 (7th Cir. 1983)	7
Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976)	9, 10
Nordlicht v. New York Telephone Co., No. 86-7218 (2d Cir., August 25, 1986)	6, 7, 8, 9
Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961)	11

Statutes

Federal Communications Act, 47 U.S.C. § 414 .. 2, 8, 10

Illinois Consumer Fraud and Deceptive Practices Act, Ill.Rev.Stat., Ch. 121½, §§ 261 *et seq.* ... 3

Illinois Code of Civil Procedure, Ch. 110, § 2-619 . 4

28 U.S.C. § 1332(a) 3

47 U.S.C. § 151 5

49 U.S.C. § 1506 10

No. 86-454

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MCI TELECOMMUNICATIONS CORPORATION,

Petitioner,

v.

S. KELLERMAN, d/b/a Authorized Sales & Service; LOUIS T. DAVIS & ASSOCIATES, INC.; and BERNARD TUROVITZ,

Respondents.

MCI TELECOMMUNICATIONS CORPORATION,

Petitioner,

v.

PHYLLIS HESSE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT PHYLLIS HESSE'S BRIEF IN OPPOSITION

Respondent Phyllis Hesse respectfully requests that this Court deny the petition of MCI Telecommunications Corp. for a writ of certiorari seeking review of the decision of the Illinois Supreme Court in this case.

ADDITIONAL STATUTE INVOLVED

Section 414 of the Federal Communications Act, 47 U.S.C. § 414 (1982), states:

> Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

COUNTERSTATEMENT OF FACTS

On August 4, 1983, respondent Phyllis Hesse ("Hesse") filed a two-count class action complaint for damages and injunctive relief against petitioner, MCI Telecommunications Corp. ("MCI"), in the Circuit Court of Cook County, Illinois. Hesse's complaint alleged, *inter alia*, that on or about September 4, 1981, she entered into an agreement with MCI to utilize the latter's long distance phone service; that MCI had represented to the general public, including Hesse, that its billing practices were identical to those of the Bell System; that, unlike the Bell System, MCI knowingly and on a consistent basis billed its customers for uncompleted long-distance calls without disclosing that charges were being imposed for such calls; that MCI failed to disclose its practice of adding an additional minute to the charges it billed where the recipient's phone rang more than six times before it was answered; and that, as a result of this course of conduct by MCI, Hesse and other MCI customers were charged and paid for uncompleted long-distance calls. Hesse's complaint alleged that the aforementioned acts constituted a violation of the

Illinois Consumer Fraud and Deceptive Business Practices Act, Ill.Rev.Stat. ch. 121½, §§ 261 *et seq.*, and common law fraudulent misrepresentation.[1]

MCI filed a Petition for Removal, removing the case to the United States District Court for the Northern District of Illinois. The Petition alleged that the federal court had diversity jurisdiction over the action under 28 U.S.C. § 1332(a). No other basis for federal jurisdiction was asserted.

Upon Hesse's subsequent agreement to eliminate her claim for injunctive relief, MCI agreed to accept remand of the case to the Circuit Court of Cook County, and the case was remanded. MCI then filed a Motion to Stay or Dismiss Hesse's Complaint in the Circuit Court, raising for the first time the issues of federal preemption and primary jurisdiction.

In another matter, the Federal Communications Commission ("FCC") on November 8, 1984 released its Memorandum Opinion and Order in *Bill Correctors, Ltd. v. MCI Telecommunications Corp. et al.*, Docket No. E-84-11. In that case, Bill Correctors, Ltd. had filed a complaint with the FCC alleging that a number of communications carriers, including MCI, had overcharged their customers by billing for incompleted calls as well as for the time period between call placement and connection. Bill Correctors asked the FCC to order the billing practices of the carriers to be disclosed in tariffs filed with the FCC and to require the carriers to honor all claims for refunds of disputed charges. The FCC concluded that the carriers' bill-

---

[1] Contrary to the representation in MCI's Petition (hereinafter referred to as "MCI Pet."; MCI Pet. at 4), Hesse's complaint does not contain a breach of contract count.

ing practices need not be contained in the tariffs, but it ordered the carriers to inform the FCC of the means by which they advise customers of the possibility of billing errors and of their credit policies regarding calls of short duration. Finally, the FCC stated that, unless its review of those carriers' submissions revealed that their notification procedures were unsatisfactory, the agency did not anticipate the need for further responsive pleadings in the case.

One of the carriers in *Bill Correctors*, Lexitel Corporation, had filed a cross-complaint seeking relief for the torts of slander and interference with business relationships. Significantly, the FCC dismissed the cross-complaint because, in the opinion of the agency, it raised issues beyond the Commission's jurisdiction.

On November 21, 1984, the trial court in the instant case denied MCI's Motion to Stay or Dismiss. The trial court found that Hesse's claims were not preempted by federal law, that the FCC did not have primary jurisdiction over the case, and that the tests for stay or dismissal pursuant to Section 2-619 of the Illinois Code of Civil Procedure (Ill.Rev.Stat., ch. 110, § 2-619) had not been met.

MCI appealed the trial court's order to the Illinois Appellate Court, which, on June 3, 1985, issued its opinion affirming the trial court. *See* MCI Pet. at C-1. The Illinois Supreme Court allowed MCI's petition for leave to appeal and issued its decision on May 21, 1986, affirming the Appellate Court in all respects. *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 493 N.E.2d 1045 (1986). *See* MCI Pet. at A-1.

In a lengthy and thoughtful opinion, the Supreme Court correctly noted that "[p]laintiffs do not challenge the reasonableness of the additional charges imposed by defendant, but only the fact that its advertising did not disclose

that the additional charges would be made." 112 Ill.2d at 436. The court discussed the preemption doctrine and quoted this Court's enumeration of the "well-established" principles regarding preemption in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). The court then noted the express purpose of the Communications Act, *i.e.*, to " 'make available, so far as possible, to all the people of the United States a rapid, efficient . . . communication service with adequate facilities at reasonable charges.' " 112 Ill.2d at 439, *quoting*, 47 U.S.C. § 151. The court reviewed other pertinent sections of the Communications Act as well. The Illinois Supreme Court found that, although the Communications Act represents a "broad scheme for the regulation of interstate service by communications carriers," 112 Ill.2d at 440, *quoting*, *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486, 490 (2d Cir. 1968), the court could not agree

> that Congress intended to supplant all State regulation of interstate telephone carriers, no matter how unrelated the State regulation is from Congress' objective of creating an interstate telephone network that is rapid, efficient and reasonably priced.

112 Ill.2d at 440-41. Rather, the court, relying on *Comtronics, Inc. v. Puerto Rico Telephone Co.*, 553 F.2d 701, 707-08 n. 6 (1st Cir. 1977), concluded that the Communications Act's savings clause "preserv[es] causes of action for breaches of duties distinguishable from those created under the Act." 112 Ill.2d at 441, *quoting*, *Comtronics*. Thus, "[s]tate-law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by [the savings clause]." 112 Ill.2d at 443.

The court thus concluded that because the claims at issue involve neither the quality of MCI's service nor the reasonableness or lawfulness of its rates, prosecution of these claims would not interfere with the delivery of telephone service to MCI's customers and "any possible effect the litigation could have on defendant's telephone rates is speculative at best." *Id.* at 443-44. The court also noted that plaintiffs here simply seek to hold MCI "to the same standards as they would any other business which advertises on a nationwide basis and which, in the course of its business, is subject to regulation from a number of Federal and State agencies." *Id.* at 443.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

NO CONFLICT EXISTS BETWEEN THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE DECISION OF THE ILLINOIS SUPREME COURT IN THIS CASE.

The only reason presented by MCI for granting the writ is an alleged conflict between the decision of the Illinois Supreme Court and the decision of the United States Court of Appeals for the Second Circuit in *Nordlicht v. New York Telephone Co.*, No. 86-7218 (2d Cir. Aug. 25, 1986).[2] In *Nordlicht*, the plaintiff's complaint alleged that

[2] MCI also cites six federal district court decisions that it contends are in conflict with the decision of the Illinois Supreme Court. Those decisions, however, do not come within the mean-

(Footnote continued on following page)

New York Telephone billed him in American dollars for telephone calls made within Canada and between Canada and the United States when he should have been charged in Canadian currency. Nordlicht's complaint asserted claims against New York Telephone for money had and received and for fraud. Contrary to MCI's assertion (MCI Pet. at 9), Nordlicht's claims did not involve the disclosure practices of New York Telephone.

While Nordlicht challenged the lawfulness of New York Telephone's charging practices, the plaintiff in this case challenges MCI's practice of intentionally misleading its customers through deceptive and false advertising. There is a clear distinction between a challenge to a communication carrier's billing practices, arguably covered by Section 201(b) of the Communications Act, and its deceptive practices with respect to advertising.[3] Furthermore, while MCI relies on *Nordlicht* to support its preemption argument, the *Nordlicht* court specifically found that the claims in that case did *not* arise under the Communica-

---

[2] *continued*
ing of a "conflict" under Supreme Court Rule 17. In addition, other federal district courts have agreed with the Illinois Supreme Court that no preemption exists under facts indistinguishable from those presented here. *See, e.g., Bruss Co. v. Allnet Communication Services, Inc.*, 606 F.Supp. 401 (N.D. Ill. 1985); *Kaplan v. ITT-U.S. Transmission Systems, Inc.*, 589 F.Supp. 729 (E.D.N.Y. 1984).

[3] MCI has itself contended that telecommunications carriers continue to be subject to the duties and liabilities imposed by laws other than the Communications Act. For example, in *MCI Communications v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir. 1983) (an antitrust action in which MCI opposed AT&T's defense that the FCC's control over the telecommunications industry rendered the defendant immune from antitrust liability), the Seventh Circuit held that there was no immunity and that, "the allowance of antitrust liability is likely to complement rather than undermine the applicable statutory scheme." 708 F.2d at 1104.

tions Act, but rather were governed by federal common law. *Nordlicht* thus supports plaintiff's position that her claims do not come within the scope of the Communications Act. In any event, the *Nordlicht* court clearly erred in ignoring the existence and significance of the Communications Act's "savings clause."

MCI also relies upon the case of *Ivy Broadcasting Co. v. American Telephone and Telegraph Co.*, 391 F.2d 486 (2d Cir. 1968), in support of its contention that Hesse's claims are preempted. In *Ivy*, the plaintiff brought state law claims against the defendant communications carrier for its alleged gross negligence in providing telephone hook-ups in connection with the plaintiff's broadcasts. The court in *Ivy* concluded that the "congressional purpose of uniformity and equality of rates should be taken to imply uniformity and equality of service" and that the "published tariff rate will not be uniform if the service for which a given rate is charged varies from state to state according to differing state requirements." 391 F.2d at 491. For this reason, the court concluded that "the congressional purpose" could be achieved "only if a uniform federal law governs as to the *standards of service* which the carrier must provide and as to the extent of liability for failure to comply with such standards." *Id.* (emphasis supplied). In *Ivy*, the "standards of service," which were the basis of plaintiff's complaint, could not be considered separately from the uniformity requirements dictated by federal law. No similar considerations apply here, where the duties allegedly breached by MCI are not duties addressed by the Communications Act. In addition, *Ivy* did not acknowledge the existence or significance of the Section 414 savings clause.

The ultimate issue to be resolved in this case is whether MCI's representations and omissions amount to common

law fraud and/or violations of state consumer protection statutes, subjects not addressed by the Communications Act. Thus, neither *Ivy* nor *Nordlicht* is on point, and the Illinois Supreme Court's opinion in this case does not present a conflict with any decisions of the Courts of Appeals.

II.

MCI'S PREEMPTION ARGUMENT HAS ALREADY BEEN DECIDED BY THIS COURT AND DOES NOT MERIT REVIEW.

As the acts complained of by plaintiff Hesse do not relate to MCI's billing practices or rendering of communications services, *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), is dispositive of MCI's preemption argument. In *Nader*, this Court held that plaintiff's common law tort action based on alleged fraudulent misrepresentations by an air carrier did not have to be stayed pending reference to the Civil Aeronautics Board ("CAB") for determination of whether the practice was "deceptive" within the meaning of the Federal Aviation Act ("Aviation Act"), even though the air carrier was subject to regulation by that administrative agency. Nader had been bumped from an overbooked flight on which he had a confirmed reservation. Nader's suit sought relief for common law fraudulent misrepresentation, claiming that the airline failed to inform him in advance of its deliberate overbooking practices. The District Court found for Nader, the Court of Appeals stayed the tort claim pending initial consideration by the CAB, and this Court granted *certiorari*.

Although Allegheny, on appeal to this Court, did not challenge the lower court's holding that the common law claim was not preempted by the Aviation Act, this Court nonetheless considered that question in the course of

rendering its decision. This Court noted that the Aviation Act explicitly provides that it does not "in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 426 U.S. at 298, *quoting*, 49 U.S.C. § 1506. This Court found that "we are not faced with an irreconcilable conflict between the statutory scheme and the persistence of common-law remedies." 426 U.S. at 299.

The instant case is indistinguishable from *Nader*. MCI argues that federal law has preempted the communications field, yet it fails to acknowledge the existence or significance of the Communications Act's savings clause. Section 414 of the Communications Act is identical in substance to the Aviation Act's "savings clause" as interpreted in *Nader*.[4]

MCI contends that the Illinois Supreme Court's decision "ignores the fact that plaintiffs directly challenge MCI's federally regulated charges, practices and tariffs . . . ." MCI Pet. at 10. MCI, however, fails to acknowledge that the FCC, in the *Bill Correctors* proceeding, concluded that the carriers' billing practices *need not* be contained in the tariffs. In addition, MCI has never suggested that the practices of which plaintiff complains—failing to disclose in its advertising that it bills for some unanswered calls and sometimes charges for "ring time"—are set forth in any of its filed tariffs.

---

[4] See also, *Ashley v. Southwestern Bell Telephone Co.*, 410 F. Supp. 1389, 1392-93 (W.D. Tex. 1976), where the court found that "the Communications Act of 1934 does not preempt state law in the area of remedies for invasion of privacy" and that "*federal remedies therefore, are cumulative to those already existing at common law or by statute.*" (emphasis supplied); *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701, 708 n. 6 (1st Cir. 1977).

MCI does not argue here, as it did below, that this case should be referred to the FCC under the doctrine of primary jurisdiction. Yet it nonetheless suggests that the FCC is the appropriate forum for plaintiff's complaints. MCI fails to note that the FCC in *Bill Correctors*, after directing the carriers to inform the agency of the means by which they advise customers of the possibility of billing errors, stated that, unless its review of those submissions revealed that the notification procedures were unsatisfactory, it did not anticipate the need for further pleadings in the case. Furthermore, it is plaintiff's understanding that the FCC has, in fact, not taken further action on those issues since it issued the *Bill Correctors* opinion in 1984.

MCI also argues that the decision below presents the risk of "inconsistent regulation" and that "consistent federal control" over the disclosure practices of interstate telecommunications carriers is needed. This Court, however, has cautioned that the need for uniformity in the application of federal legal standards is not, by itself, a sufficient basis on which federal courts may determine that their jurisdiction is exclusive. *See Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656, 665-66 (1961); *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U.S. 285, 290-91 (1922). In addition, the trial court in these consolidated cases has certified nationwide classes as to each of the claims. That fact, together with the fact that there are no other certified classes in state or federal court presenting these same claims, greatly ameliorates any risk of inconsistent adjudications.

Additional factors also militate against the significance of the decision below and present further reasons why this Court should not grant *certiorari*. The order appealed from is interlocutory. Further proceedings will present a

more fully developed record which will demonstrate the lack of any risk of inconsistent adjudications with respect to MCI's disclosure duties and may, in the event plaintiff does not succeed on the merits, moot the issue. Also, as MCI noted in its Motion for an Extension of Time in this Court, the parties are engaged in settlement negotiations, the results of which may moot the entire controversy.

The Illinois Supreme Court has correctly held that its courts present the proper forum for the adjudication of plaintiff's state law claims. The fact that MCI provides interstate telecommunications services and is regulated by the FCC is of no particular import here, where the Communications Act does not address the subject of deceptive and fraudulent practices and where the statute contains a savings clause which clearly preserves plaintiff's state law claims to the extent that they involve duties distinct from those addressed by the Communications Act.

CONCLUSION

For all the foregoing reasons, respondent Phyllis Hesse prays that the writ of certiorari be denied.

Respectfully submitted,

HOWARD Z. GOPMAN
HOWARD Z. GOPMAN & ASSOC.
5225 Old Orchard Road
Skokie, Illinois 60077
(312) 965-8910

KEVIN M. FORDE *
KATRINA VEERHUSEN
KEVIN M. FORDE, LTD.
111 West Washington Street
Chicago, Illinois 60602
(312) 641-1441

RICHARD J. PRENDERGAST
JOSEPH E. TIGHE
RICHARD J. PRENDERGAST, LTD.
111 West Washington Street
Chicago, Illinois 60602
(312) 641-0881

* Counsel of Record

Attorneys for Phyllis Hesse